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# SECOND GENERATION GENDER BIAS IN COLLEGE COACHING: CAN THE LAW REACH THAT FAR?\*

PAMELA BASS\*\*

## I. INTRODUCTION

On November 24, 2014, Patsy Mink, the “Mother of Title IX,” received the Presidential Medal of Freedom posthumously.<sup>1</sup> Title IX of the Educational Amendments of 1972 states, “No person in the United States shall, *on the basis of sex*, be excluded from participation in, *be denied the benefits of*, or *be subjected to discrimination* under any educational program or activity receiving Federal financial assistance.”<sup>2</sup> The goal of Title IX was to remove the barriers that women faced both for admission to college and for academic pursuits. By removing these educational barriers, women would be able to pursue economic and social advancement.<sup>3</sup>

In the fall of 2014, the University of Iowa and the University of Minnesota Duluth discharged successful female head coaches in the sports of field hockey and women’s ice hockey, respectively.<sup>4</sup> The terminations give pause as to why

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\*\* Pamela Bass is a 2015 graduate of the University of Connecticut School of Law. This paper was written for an assignment in Lew Kurlantzick’s Sports Law course. Several people on campus encouraged her research, but the author would like to especially thank Professor Kurlantzick and Librarian Jocelyn Kennedy for their assistance and encouragement. After law school she joined the firm of Thomas, Drohan, Waxman, Petigrow, and Mayle, LLP in Hopewell Junction, New York.

1. Press Release, White House, President Obama Announces the Presidential Medal of Freedom Recipients (Nov. 10, 2014), <http://www.whitehouse.gov/blog/2014/11/10/president-obama-announces-presidential-medal-freedom-recipients>. Mink is best known for co-authoring the bill and then acting as champion for the cause. Upon her death in 2002, the bill was renamed the Patsy T. Mink Equal Opportunity in Education Act. The Medal of Freedom is the nation’s highest civilian award. It honors individuals who have made especially meritorious contributions to the security or national interests of the United States, to world peace, or to cultural or other significant public or private interests.

2. 20 U.S.C. §§ 1681–1688 (2016) (emphasis added).

3. EQUAL PLAY: TITLE IX AND SOCIAL CHANGE 50 (Nancy Hogshead-Makar & Andrew Zimbalist eds., 2007).

4. *Iowa Fires Field Hockey Coach Just Before Season*, Q.C. TIMES (Aug. 5, 2014),

two successful professionals have been dismissed without cause. What is operating in the background, discrimination?

Title IX does not mention and was not passed for athletics. However, over the last forty-three years, Title IX has had a significant impact on intercollegiate athletics. Studies show that 2014 has the highest female participation totals in history.<sup>5</sup> In 1970, two years prior to Title IX's enactment, there was a total of 16,000 female intercollegiate athletes, whereas today there are over 200,000.<sup>6</sup> Similarly, there were only 2.3 women's teams per school in 1970, and in 2014, 8.3 women's teams.<sup>7</sup> In 2014, there was a total of 9,581 female intercollegiate teams nationwide.<sup>8</sup>

Over the same timeframe, however, the number of women serving as head coaches for women's intercollegiate teams decreased from over 90% in 1972 to 43.4% in 2014.<sup>9</sup> By 1978, when compliance with Title IX was to be enforced, only 58.2% of women's teams were coached by women.<sup>10</sup> Meanwhile, women have not made any significant gains in coaching men's teams.<sup>11</sup>

Why should people care about who is coaching female athletes? For the same reasons people should care about the economic and social role women play in society. Women are just as capable, if not more capable, to lead people on the court and in the boardroom. The more women see other women in these roles, the more they can aspire to be like them and have female role models. In addition, the more men and women see women in these roles, the more they can eliminate equating leadership exclusively with men.

This paper analyzes why, at a time of great participation and access, women are disappearing from leadership positions as head coaches. Two perspectives are offered: one, economic and social, and the other, legal. The economic and

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[http://qctimes.com/sports/college/big-10/iowa/iowa-fires-field-hockey-coach-just-before-season/article\\_428fe746-c463-5ab6-ad27-e88ba353ad2d.html](http://qctimes.com/sports/college/big-10/iowa/iowa-fires-field-hockey-coach-just-before-season/article_428fe746-c463-5ab6-ad27-e88ba353ad2d.html); Bob Collins, *Despite Success, UMD Fires Women's Hockey Coach*, MINN. PUB. RADIO NEWS: NEWSCUT (Dec. 16, 2014, 10:43 AM), <http://blogs.mprnews.org/newscut/2014/12/despite-success-umd-fires-womens-hockey-coach/>.

5. R. VIVIAN ACOSTA & LINDA JEAN CARPENTER, WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL NATIONAL STUDY: THIRTY-SEVEN YEAR UPDATE, 1974–2014 1 (2014). In fact, 2,080 new women's teams have been added to intercollegiate athletic programs for women since 2000. *Id.* Basketball is the most popular women's sport followed by volleyball, soccer, and cross-country. *Id.* at 1–2.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 18.

10. *Id.*

11. *Id.* The Acosta & Carpenter study shows a negligible increase in the number of men's teams coached by females from 2% in 1972 to 3.5% in 2014. *Id.* Men's teams coached by females are most likely to occur in individual sports like track & field, cross country, swimming, and tennis, rather than team sports like basketball, ice hockey, soccer, volleyball, baseball, or lacrosse. *Id.*

social perspective combines to create a vicious cycle, leading to a decline in female coaches. A perception exists that men are better coaches. As there is more pressure on athletic departments to have winning teams, coaching salaries are higher. Men are attracted by the salaries and are more willing to accept positions coaching women. Administrators are more confident or comfortable with male coaches, so they hire them. In addition, as athletic department finances are being scrutinized, administrators are looking for the best possible return on their investment, or least possible economic loss.

The legal perspective finds that blatant first generation gender bias is declining with the legal remedy of Title IX. The law, however, has not found an answer to second-generation gender bias, a more subtle bias. Section II looks at the background and history that has affected the number of females coaching women's intercollegiate athletics. Section III looks at Title IX as a means to increase athletic participation and as a means of eliminating sex discrimination in hiring and recruiting practices. Section IV looks at the present sex discrimination bias in intercollegiate athletics by analyzing the recent dismissals at the University of Iowa and the University of Minnesota Duluth, and key historical cases involving coaches of women's teams and female administrators. Section V examines the role of retaliation in fighting for compliance with Title IX. Section VI looks at the Equal Pay Act and whether coaching men's teams is the same as coaching women's teams, while Section VII examines Title VII and disparate impact. Section VIII reviews how several state laws deal with gender equity and discrimination. Section IX, then, analyzes the hiring practices in other fields to see what the coaching world can learn about gender discrimination bias. The conclusion looks at the ability of the law to protect women against second-generation gender discrimination and how vital it is to the economic and social forces of intercollegiate athletics at a time when the NCAA amateur model is about to experience a revolutionary change.

## II. THE INFLUX OF MEN COACHING FEMALE ATHLETIC TEAMS

### *A. Semantics: Viewpoint Analysis Makes a Difference: Is There a Decline of Women or a Lack of Women Rising in the Coaching Ranks?*

The research in coaching, participation, and administrative leadership refers to a decline in the number of women leading and coaching women's teams. The takeover of women's athletics by the National Collegiate Athletic Association (NCAA) did not simply change the rules of who was sponsoring sports on a national level. In reality, it ended one game (the physical education based model) and created a new game of women's athletics (housed in intercollegiate athletics). To compare coaching numbers from a time when women's teams

were housed in physical education departments to a time when they are in intercollegiate athletic departments is misleading—it is like comparing apples and oranges. It also detracts attention from the primary issue of why men who are in the leadership roles of athletic departments are not hiring female coaches. Why are women not rising in the coaching ranks when they have more opportunities to play and coach than ever before?

*B. Background: From Physical Education to the AIAW and, Then, the NCAA*

Before Title IX, the NCAA showed very little interest in women's sports; and women showed no interest in the NCAA. Women's athletics originated from physical education.<sup>12</sup> In order to keep control over women's athletics and not lose it to the Amateur Athletic Union (AAU) or semi-pro teams at private clubs, the administrators of women's physical education programs decided it would be better to have women compete in a system overseen by qualified women than give control to the NCAA or the AAU.<sup>13</sup>

"The NCAA was [established] in 1906 to protect young people from the dangerous and exploitive athletics practices of the time."<sup>14</sup> Women were not a consideration as they attended all women's institutions, and co-education did not become commonplace until the 1960s.<sup>15</sup> In 1966, the NCAA announced that it would limit its jurisdiction and authority to male student-athletes and limit national championships solely to male sports.<sup>16</sup> In January 1972, the Association for Intercollegiate Athletics for Women (AIAW) was formally established with 275 colleges and universities making up its membership.<sup>17</sup> The AIAW leadership and other female leaders on their own campuses were challenged with the balance of fighting for equal funding and equal recognition,

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12. Welch Suggs, *Heroines as Well as Heroes*, in EQUAL PLAY: TITLE IX AND SOCIAL CHANGE 14 (Nancy Hogshead-Makar & Andrew Zimbalist eds., 2007).

13. *Id.* at 15.

14. *History*, NCAA.ORG, <https://web.archive.org/web/20110807060521/http://www.ncaa.org:80/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history> (last updated Nov. 8, 2010).

15. *The History of Women and Education*, NAT'L WOMEN'S HIST. MUSEUM, <https://www.nwhm.org/online-exhibits/education/introduction.html> (last visited June 9, 2016). Although Iowa and Wisconsin became co-ed in 1855 and 1863, respectively, there was a clear second-class treatment towards women. The year 1965 brought passage of affirmative action under the Civil Rights Act and the Higher Education Act.

16. Suggs, *supra* note 12, at 16.

17. *Id.* The AIAW was created out of the AAHPER Commission on Intercollegiate Athletics. *Id.* The AIAW brought a sense of ownership and protectiveness to the leaders of women's athletics. *Id.* They believed they could avoid the troubles of the times facing men's athletics. *Id.*

while also maintaining their independence.<sup>18</sup> Despite a few attempts by the NCAA to challenge the “separate, but equal” athletic world under the Fourteenth Amendment, women prevailed.<sup>19</sup> Still, however, tensions remained between the NCAA and the AIAW.<sup>20</sup> The NCAA used corporate sponsorships and television contracts in addition to institutional influence to defeat the AIAW.<sup>21</sup>

When Title IX passed, the NCAA had a three-stage plan of attack. First, it fought for athletics to be excluded from Title IX.<sup>22</sup> Second, it determined that if women’s athletics were included in Title IX, then it was in the best interest of the NCAA to control women’s athletics.<sup>23</sup> Third, the NCAA seized control of

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18. *Id.* at 18. See also CHRISTINE H.B. GRANT, THE GENDER GAP IN SPORT: FROM OLYMPIC TO INTERCOLLEGIATE LEVEL, ARENA REVIEW 43–44 (1984) (discussing the AIAW Recruiting System with goals “(a) to avoid the harassment of high school athletes; (b) to create a system that was financially reasonable to all member institutions; and (c) to prevent the burnout of coaches who spend excessive time in the recruitment of athletes”).

19. Suggs, *supra* note 12, at 19.

20. See *id.* at 19–23. In 1975, the NCAA sent Thomas A. Jernstedt to the AIAW Delegate Assembly in Houston, Texas, from January 5th to January 8th, to inform the AIAW that the NCAA had full intention of giving full institutional control of intercollegiate athletics to one administration under the same legislative rules. *Id.* at 23. In addition, Mr. Jernstedt shared that the NCAA intends to offer national championships for women. *Id.* The reaction was so negative that the NCAA was forced to table its intentions. *Id.*

21. EQUAL PLAY: TITLE IX AND SOCIAL CHANGE, *supra* note 3, at 106. For example, the NCAA would require in its television contracts that to air NCAA games they could not air AIAW games (including championships).

22. Suggs, *supra* note 12, at 24. Suits were filed against the AIAW by several schools over the lack of scholarships offered to female athletes. The cases were settled but began to chip away at the strength of the AIAW. In addition, the Tower Amendment and the initial Grove City College case were overturned with the Civil Rights Restoration Act of 1988, which extended Title IX coverage to all programs at all educational institutions that receive any federal assistance, directly or indirectly. See *Title IX Legislative Chronology*, WOMEN’S SPORTS FOUND., <http://www.womenssportsfoundation.org/home/advocate/title-ix-and-issues/history-of-title-ix/history-of-title-ix> (last visited June 9, 2016). See also KATE CRUIKSHANK, THE ART OF LEADERSHIP: A COMPANION TO AN EXHIBITION FROM THE SENATORIAL PAPERS OF BIRCH BAYH 47 (2007); see also NCAA v. Califano, 444 F. Supp. 425 (D. Kan. 1978). The district court held that the NCAA failed to allege any “injuries in fact,” both causally related to actions of the Department of Health, Education, and Welfare (HEW) and for which the NCAA or its members incurred. *Id.* at 429. These allegations included HEW having jurisdiction beyond their scope, regulations exceeding the lawful scope of Title IX, invalidated NCAA rules as arbitrary and capricious, violated the Fifth Amendment and created a sex-based quota system, and regulations inconsistent with the objectives of Title IX and financial aid. *Id.* In addition, the court dismissed as “unripe” the NCAA’s allegation of HEW evaluation criteria being impermissibly vague and indefinite and giving “HEW unimpeded discretion.” *Id.* at 429, 437.

23. See Suggs, *supra* note 12, at 23. See also Michelle Hosick, *Equal Opportunity Knocks*, NCAA.COM, <http://www.ncaa.com/news/ncaa/2011-02-02/equal-opportunity-knocks> (last updated Feb. 2, 2011); PATRICIA ANN ROSENBROCK, PERSISTENCE AND ACCOMMODATION IN A DECADE OF STRUGGLE AND CHANGE: THE CASE OF WOMEN ADMINISTRATORS IN DIVISION IA INTERCOLLEGIATE ATHLETICS PROGRAMS 53 (1987) (discussing the change in attitude and mentality that accompanied the decision to offer female athletic scholarships at Iowa).

women's athletics by blocking the AIAW's access to financial resources associated with national championships.<sup>24</sup> The third tactic led to the demise of the AIAW. The 1981 NCAA Convention is remembered as one of the most controversial, as the NCAA voted on whether it should control women's athletics by offering national championships.<sup>25</sup> The first vote ended in a 124-124 tie, and then on recount the tally was 128-127 against sponsoring women's championships. A re-vote was called and the vote changed to 137-117 in favor of NCAA championships.<sup>26</sup> Although the AIAW sued the NCAA, alleging that the NCAA was exercising an illegal monopoly power over college sports, the court dismissed the case.<sup>27</sup> The aggressive fight for control had negative side effects for leaders of women's athletics, as few were given a voice on NCAA committees.<sup>28</sup>

With the move of intercollegiate athletics for women from the physical education realm, the "taboo" often associated with males coaching women was strongly reduced. The AIAW gave women's intercollegiate athletics a home; however, the value of women's sports increased when the NCAA won control. Soon to follow was the economic development that an individual could make a living coaching women's intercollegiate athletics.

*C. Increasing Economic Opportunities (and the Lack of "Taboo"  
Associated with Coaching Women)*

In 1976, the University of Kentucky tried to lure Pat Summit from the University of Tennessee. The offer was for \$9,000, exactly \$100 more than she earned at the University of Tennessee. Meanwhile, men's basketball coaches were making \$60,000–\$70,000 at the time.<sup>29</sup>

Although over 90% of women's athletic teams had female head coaches in 1972, by 1978, the number had decreased to 58.2%.<sup>30</sup> Researchers account for the large drop by citing the large increase in the number of teams offered per school.<sup>31</sup> In 1972, schools offered 2.5 women's teams, and by 1978, they were

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24. Hosick, *supra* note 23.

25. *Id.*

26. *Id.* The pro-NCAA caucus discovered that most schools were split. *Id.* As athletics directors and presidents left, the faculty athletic representatives placed institutional votes, turning the vote in favor of championships. *Id.*

27. *Ass'n for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 579 (D.C. Cir. 1984).

28. Hosick, *supra* note 23.

29. JOHN R. THELIN, *GAMES COLLEGES PLAY: SCANDAL AND REFORM IN INTERCOLLEGIATE ATHLETICS* 395 (1993).

30. ACOSTA & CARPENTER, *supra* note 5, at 18.

31. *Id.*

offering 5.61 teams per school.<sup>32</sup> As discussed *supra*, the taboo associated with men coaching women's intercollegiate athletics began to lessen.

The Office for Civil Rights within the Department of Health, Education, and Welfare was charged with compiling regulations for evaluating compliance with Title IX or gender equity.<sup>33</sup> One criterion called for student-athletes to have the opportunity to receive coaching and another called for the assignment and compensation of coaches.<sup>34</sup> With the opportunity for coaching came more jobs, and with more jobs created for coaching women's sports, more men were attracted to those jobs. The marketplace allows schools to attract the best coaches and sets the salary and benefit packages. As more men were interested, salaries for coaching women's teams (although still not comparable to the men coaching men's teams) began to rise. As a result, the "taboo" associated with coaching women was eliminated.

*D. Fostering Coaches of the Future—Graduate Assistants, Managers,  
and Male Practice Players*

Since the 1980s, women's athletics programs have used male practice players. Competing against male practice players is more challenging than competing against female reserves. They simply are, for the most part, quicker, faster, and stronger. Sometimes practice players were "hidden" as managers or graduate assistants.<sup>35</sup> The NCAA incorporated the use of male practice players by specifying that a practice player could not also be a manager. Male practice players are student-athletes (simply inactive) and need to fulfill the academic, medical, and NCAA regulations like all active student-athletes.<sup>36</sup>

The use of male practice players has become a double-edged sword. On the one hand, male practice players improved the women's games and also served as ambassadors for women's sports on campus.<sup>37</sup> On the other hand, two key concerns developed. First, the regular use of male practice players may take practice and participation opportunities away from female athletes on varsity teams. Second, the unforeseen consequence of male practice players is that these male practice players are finding opportunities in the women's game and

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32. *Id.*

33. Policy Interpretation for Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71,413, 71,413 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

34. *Id.*

35. There is debate in the field of the first use of male practice players. It has been credited to Hall of Fame coaches Pat Summit at Tennessee and Jody Conradt at Texas.

36. Bill Pennington, *College Basketball; for These Men Lots of Guts, but Little Glory*, N.Y. TIMES (Mar. 5, 2004), [http://www.nytimes.com/2004/03/05/sports/college-basketball-for-these-men-lots-of-guts-but-little-glory.html?\\_r=1](http://www.nytimes.com/2004/03/05/sports/college-basketball-for-these-men-lots-of-guts-but-little-glory.html?_r=1).

37. *Id.*



now see coaching women's basketball as a viable career option for themselves.<sup>38</sup> When the use of male practice players was being discussed on a national stage, Texas Women's Athletics Director Chris Plonsky stated, "This is strictly a training issue, not an equity issue. We have other stronger and more important equity issues facing us—number of sports, number of scholarships, number of women in the athletic department."<sup>39</sup> One of Chris Plonsky's key concerns, the number of women in the athletic department, is, however, directly impacted by male practice players. For example, as one practice player at Binghamton said, "I would really like to get into coaching down the road. I want to be a teacher and I figure that by practicing with a Division I basketball program I'll be able to see different drills and plays as well as new ways of looking at the game."<sup>40</sup>

In a field where who you know is more important than what you know, access to the women's game through manager, graduate assistant, and practice player positions has enabled men to continue to enter the field in large numbers.

### *E. College Athletics Does Not Operate in a Vacuum*

In the education-based model of American athletic participation, intercollegiate athletics is the minor leagues of professional athletics on one end, and the goal for high school players on the other end. Both have a major effect on the college athletics landscape.

#### 1. WNBA (and Its Precursors)

The Women's National Basketball Association (WNBA) started in April 1996, when the National Basketball Association (NBA) Board of Governors approved the start of a women's league.<sup>41</sup> What separated the WNBA from the then-active American Basketball League (ABL), and all other attempts for a women's professional league, was the financial backing of the NBA.<sup>42</sup>

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38. Joshua Darling, *All Practice, No Play*, STAND YOUR GROUND (Feb. 27, 2007, 10:11 AM), <http://standyourground.com/forums/index.php?topic=12494.0>.

39. Dick Patrick, *Women Practicing vs. Men: Yea or Nay?*, USA TODAY (Jan. 15, 2007), [http://usatoday30.usatoday.com/sports/college/womensbasketball/2007-01-15-women-men-practice\\_x.htm](http://usatoday30.usatoday.com/sports/college/womensbasketball/2007-01-15-women-men-practice_x.htm)[http://usatoday30.usatoday.com/sports/college/womensbasketball/2007-01-15-women-men-practice\\_x.htm](http://usatoday30.usatoday.com/sports/college/womensbasketball/2007-01-15-women-men-practice_x.htm). See also WOMEN'S SPORTS FOUND., MALE PRACTICE PLAYERS ON FEMALE TEAMS, [https://www.womenssportsfoundation.org/en/home/advocate/title-ix-and-issues/title-ix-positions/male\\_practice\\_players](https://www.womenssportsfoundation.org/en/home/advocate/title-ix-and-issues/title-ix-positions/male_practice_players) (last visited June 9, 2016).

40. Darling, *supra* note 38.

41. *History of the WNBA*, WNBA, [http://www.wnba.com/about\\_us/historyof\\_wnba.html](http://www.wnba.com/about_us/historyof_wnba.html) (last visited June 9, 2016).

42. *Professional Basketball Research*, BASKETBALL RES., <http://www.basketballresearch.us/> (last visited June 9, 2016). For example, the Women's Pro Basketball League (WBL) was a women's professional league from 1977–81. In three seasons, the league generated \$14 million in losses. The ABL was in existence from 1996–98 before filing for Chapter 11 bankruptcy in 1998. *Id.*

Although not a new concept, the league used former NBA players and coaches to attract fans.<sup>43</sup> Bill Laimbeer, Brian Winters, Michael Cooper, John Shumate, Tree Rollins, Henry Bibby, Rick Mahorn, Dee Brown, and Mugsy Bogues are just a few who entered coaching from the player ranks; and Mike Thibault, Paul Westhead, John Whisenant, Nolan Richardson, Ron Rothstein, Dave Cowens, and Russ Pennell joined from the coaching circuit.<sup>44</sup> The WNBA used coaches and players from the men's game to bring a level of credibility to the league.<sup>45</sup> The idea of bringing in male coaches to give legitimacy to women's athletics is not unique to women's professional basketball: the same characteristic was seen in World War II with the advent of the All American Girls Professional Baseball League.<sup>46</sup>

## 2. High School Sports

High school athletic participation for girls has steadily grown. The chart below shows annual participation numbers by gender per year for high school athletes:<sup>47</sup>

Year	Boys Participants	Girls Participants
1971-1972	3,666,917	294,015
1972-1973	3,770,621	817,073
2013-2014	4,527,994	3,267,664

Girls are still behind boys in participation numbers. In terms of coaches of

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43. The initial season of the WNBA was a who's who of the NBA.

44. *History of the WNBA*, *supra* note 41.

45. In the WBL, Doug Bruno (Chicago Hustle) and Larry Costello (Milwaukee Does) are two examples of coaches from the men's game joining the women's game. See *Doug Bruno*, USA BASKETBALL, [http://archive.usab.com/bios/bruno\\_doug.html](http://archive.usab.com/bios/bruno_doug.html) (last updated May 12, 2014); *Larry Costello, Bucks First Head Coach, Dies at Age 70*, NBA: MILWAUKEE BUCKS, [http://www.nba.com/bucks/news/costello\\_011212.html](http://www.nba.com/bucks/news/costello_011212.html) (last visited June 9, 2016).

46. OFFICIAL WEBSITE AAGPBL, <http://www.aagpbl.org/> (last visited June 9, 2016). The league is featured in the film *A League of Their Own*. Chicago Cubs owner Philip Wrigley and L.A. Dodgers President Branch Rickey worked to get the league started during the war. *Id.*

47. THE NAT'L FED'N OF STATE HIGH SCH. ASS'NS, 2013-14 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY, [http://www.nfhs.org/ParticipationStatics/PDF/2013-14\\_Participation\\_Survey\\_PDF.pdf](http://www.nfhs.org/ParticipationStatics/PDF/2013-14_Participation_Survey_PDF.pdf).

female teams, women coach 39.6% of female teams and 7.5% of male teams.<sup>48</sup> This translates to women filling 27.5% of all the head coaching positions at the high school level.<sup>49</sup>

In terms of who is hiring and supervising high school coaches, 15% of all athletic directors nationally are female.<sup>50</sup> The role of women in leading high school athletic associations is even smaller: among executive directors of high school athletic associations, only 6% (three of forty-seven) were female, while women held 33% of the deputy executive, associate, assistant, and manager-level positions.<sup>51</sup>

### 3. AAU/Club Sports

With the proliferation of athletic scholarships for women (and men), sports have become a full year activity, rather than simply a high school season. In addition, as college attendance costs have skyrocketed, the competition for those athletic scholarships has become a strategic war plan for most collegiate athletic programs and the parents of prospective student-athletes. In response, more and more players showcase their skills in club or AAU events across the country. In addition, sport-governing bodies arrange camps that feature the most talented high school-age players in the country. Each sport is different, but for team sports in particular, the club team is seen as the greater exposure opportunity than the high school team. If a club team has a player that college coaches want, then that club coach becomes in high demand.<sup>52</sup> Likewise, if a governing body is grooming a future star, it may look the other way when abuses

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48. *Female Coaches in High School Sports: Data Released*, NICOLE M. LAVOI, PH.D. (May 28, 2013), <http://www.nicolemlavoi.com/2013/05/28/female-coaches-in-high-school-sports-data-released/>.

49. *Id.*

50. Mike White, *Varsity Xtra / A New Direction: Women Athletic Directors Rising Sharply*, PITT. POST-GAZETTE (Oct. 5, 2012), <http://www.post-gazette.com/hsother/2012/10/05/Varsity-Xtra-A-new-direction-Women-athletic-directors-rising-sharply/stories/201210050243>.

51. Ellen J. Staurowsky & Michael Proska, *Gender Equity at the High School Level*, WOMEN COACHING (July 15, 2013), <http://stream.goodwin.drexel.edu/womenincoaching/2013/07/15/gender-equity-at-the-high-school-level/>.

52. Eric Adelson, *True Lies*, ESPN (Mar. 29, 2013), [http://espn.go.com/espn/story/\\_/page/Mag15truelies/beloved-colorado-club-basketball-coach-rick-lopez-arrested-having-sex-students-espn-magazine-archives](http://espn.go.com/espn/story/_/page/Mag15truelies/beloved-colorado-club-basketball-coach-rick-lopez-arrested-having-sex-students-espn-magazine-archives). This story of Rick Lopez illustrates how college coaches and parents can be blinded by the truth as the coach chases a top recruit and a recruit chases a Division I scholarship. Coach Lopez was an assistant at Metropolitan State in Colorado from 1989 to 1991. *Id.* The head coach at Metropolitan State released Lopez after learning that he was having an inappropriate relationship with a player. *Id.* Lopez then built the Colorado Hoopsters into a top girls' basketball club program. *Id.* He had several high and a number of mid-Division I prospects. *Id.* He was convicted of fifty-five felony offenses for his inappropriate relationships with players. *Id.* He died of an apparent suicide in jail. *Id.*

or other negatives arise.<sup>53</sup> Although no formal studies have been done on the gender of club team coaches coaching women, casual observance finds it consistent with high school and collegiate coaching.<sup>54</sup>

Both below college athletics (in high school- and club-level sports) and above in the WNBA, a consistent message is being sent, male coaches bring legitimacy to women's sports and young women are seeing men coaching women as the norm.

### F. Additional Factors

#### 1. The Old Boy's Network

The Acosta and Carpenter study found that, in 2014, 10.6% of all Division I athletic directors were female.<sup>55</sup> Interestingly, the percentage of female athletic directors increases as one moves down in level from Division I to Division II (23.2% female) and then to Division III (30.3% female).<sup>56</sup> Similarly, there is a difference within Division I based upon the level of football program offered.<sup>57</sup> For schools that do not offer football, the percentage of female athletic directors is 15.6%, while the football non-bowl series is 11.3%, and football bowl series is 6.3%, respectively.<sup>58</sup>

The gender of athletic administrators is important. First, it demonstrates to all student-athletes the leadership of an athletic department. Second, there is a

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53. See Megan Chuchmach, *Former Olympic Swim Coach Charged with Child Abuse*, ABC NEWS (Oct. 25, 2012), <http://abcnews.go.com/Blotter/olympic-swim-coach-charged-childabuse/story?id=17565246> (illustrating a 20/20 Investigation that uncovered that in ten years thirty-six coaches were banned by US Swimming for sexual misconduct). See also Katy Waldman, *The Devastating Pattern of Sexual Abuse in Competitive Swimming*, SLATE: XX FACTOR (Nov. 13, 2014, 10:15 AM), [http://www.slate.com/blogs/xx\\_factor/2014/11/13/outside\\_magazine\\_s\\_story\\_on\\_sexual\\_abuse\\_in\\_competitive\\_swimming\\_is\\_devastating.html](http://www.slate.com/blogs/xx_factor/2014/11/13/outside_magazine_s_story_on_sexual_abuse_in_competitive_swimming_is_devastating.html).

54. See *Who, What, Where, When, Why, How*, GYMRAT CHALLENGE, <http://gymratchallenge.com/girls-event/who-what-where-when-why-how/> (last visited June 9, 2016). The GymRat Challenge is a premier girls' basketball recruiting event held in June each year as club teams prepare for the July Division I recruiting season. Although Division I recruiters are not allowed to observe the event under NCAA rules, a number of Division I-caliber players participate. In an informal review of the rosters for each team, only 28% or fifty-eight of the 208 teams ages 13 and under to 16 and under were coached by women. *Id.* Interestingly, the percentage of female coaches decreased as the age of the players increased: 13 and under (sixteen female coaches/thirty-two teams); 14 and under (fifteen female coaches/thirty-two teams); 15 and under (fifteen female coaches/sixty teams); and 16 and under (twelve female coaches/eighty-four teams). *Id.* See also Risa Isard, *Why Aren't More Moms Coaching?*, RAISING ARIZ. KIDS (Aug. 2015), <https://www.raisingarizonakids.com/2015/08/why-arent-more-moms-coaching/>.

55. ACOSTA & CARPENTER, *supra* note 5, at 37.

56. *Id.*

57. *Id.*

58. *Id.*

correlation between the gender of the administrator and the gender of coaches for female teams: female athletic directors have more female head coaches coaching women's teams and male athletic directors have more male head coaches coaching women's teams.<sup>59</sup> Although the correlation exists, it may not be as significant in Division I because there are fewer female athletic directors.

## 2. The Merging of Division I Athletic Departments or a Strong Presence

After the NCAA gained control of women's athletics nationally, the next step was leveraging that control on campus. This movement of merging men's and women's athletic departments into one, rather than maintaining two separate departments, changed the leadership role for women's administrators. Each merger capitulated to financial, social, and/or institutional pressures. In a few instances, strong female leadership maintained influence,<sup>60</sup> but in most situations the women's athletic director was demoted and reported to the men's athletic director.<sup>61</sup> The last three athletic programs to merge were the University of Arkansas, the University of Texas at Austin, and the University of Tennessee-Knoxville.<sup>62</sup> Dr. Christine Grant, the former president of the AIAW and the former women's athletic director at the University of Iowa, states: "The NCAA fought Title IX through the 1970's. It's my feeling because (male administrators) lost in their efforts to dilute Title IX that they then did the next best thing: take control of women's sports and therefore control expenditures. It was a strategic move."<sup>63</sup>

One explanation for the underrepresentation of female intercollegiate athletic directors is homologous reproduction, or insider preferences.<sup>64</sup> Another

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59. *Id.* at 36.

60. Press Release, Univ. of Iowa, Dr. Christine Grant Announces Her Retirement (June 27, 2000), <http://news-releases.uiowa.edu/2000/june/0627grant.html>. Dr. Grant said, "We also have a wonderful president and key people in administration devoted to true equality for women in sport. We are indeed in good hands." *Id.*

61. Heidi Grappendorf & Nancy Lough, *An Endangered Species: Characteristics and Perspectives from Female NCAA Division I Athletic Directors of Both Separate and Merged Athletic Departments*, 2 SPORT MGMT. & RELATED TOPICS J. 6, 7 (2006). The last Division I institutions with separate athletic departments for men and women shared in common the presence of strong women leaders: Donna Lopiano at the University of Texas, Joan Cronan at the University of Tennessee, and Bev Lewis at the University of Arkansas.

62. *Id.* at 6; see also *Arkansas to Merge Men's, Women's Athletic Programs*, ESPN (Nov. 15, 2007), <http://sports.espn.go.com/ncaa/news/story?id=3112264>.

63. Grappendorf & Lough, *supra* note 61.

64. *Id.* at 8. Homologous reproduction is when dominants reproduce themselves based on social or physical characteristics. *Id.* The like characteristic of gender could play a major role both up the organizational chart if presidents follow homologous reproduction and also down the chart if athletic directors follow homologous reproduction with both their staff and with head coaches. Insider preference is liking to surround oneself with similar people.

barrier present is subtle or unconscious discrimination,<sup>65</sup> which has been described as second-generation discrimination. Other potential barriers to women holding athletic administration positions include failure of the old girls network and strength of the old boy's network, a lack of support by other women, and burnout.

Even though the University of Arkansas resisted merging its men's and women's athletic departments for thirty-five years, it still succumbed to a male-oriented, merged structure in 2007. The incoming athletic director, Jeff Long, was named Vice Chancellor of Intercollegiate Athletics and reports directly to the Chancellor, John A. White. Bev Lewis, the longtime Director of Women's Athletics, was named Associate Vice Chancellor and reports to Long.

### 3. Male Advantage: Two Way Street v. One Way Street

A number of male coaches from the men's game have moved to the women's game without any prior women's coaching experience. For example, Dennis Wolff, the former Head Men's Basketball Coach at Boston University and at the time Director of Men's Basketball Operations at Virginia Tech, was named the Hokies Head Women's Basketball Coach. Similarly, Phil Seymore went from being an assistant coach on the men's staff at Providence to being named its Head Women's Basketball Coach. Alabama hired one of its assistant athletic directors, a former male player at the school, to be its Head Women's Basketball Coach. Similarly, ESPN basketball analyst Jimmy Dykes was hired at his alma mater, Arkansas, to be their Head Women's Basketball Coach.<sup>66</sup>

### 4. Straight Talk from Student-Athletes

A study in March 2013 shook the world of college athletics when it found that 81% of female athletes at the Division I level preferred a male head coach.<sup>67</sup> The concept termed, "think coach, think male," is a play off a 1973 study that attributed managerial success to male attributes and coined the term "think

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65. *Id.*

66. Nicole Auerbach, *Glass Ceiling: Why Women Aren't Coaching Men's D-I Hoops*, USA TODAY (Nov. 12, 2013), <http://www.usatoday.com/story/sports/ncaab/2013/11/12/women-coaching-men-bernadette-locke-mattox-stephanie-ready/3006139/>; see also Ben Frederickson, *Arkansas Women's Basketball Coach Jimmy Dykes Defends His Hire at SEC Tipoff*, KNOX NEWS (Oct. 21, 2014), [http://www.knoxnews.com/govolsxtra/basketball/arkansas-womens-basketball-coach-jimmy-dykes-defends-his-hire-at-sec-tipoff\\_46133853](http://www.knoxnews.com/govolsxtra/basketball/arkansas-womens-basketball-coach-jimmy-dykes-defends-his-hire-at-sec-tipoff_46133853).

67. NANCY JO GREENAWALT, ROBERT FLEISCHMAN & PATRICIA SMEATON, MODERN SEXISM AND PREFERENCE FOR A COACH AMONG SELECT NATIONAL COLLEGIATE ATHLETIC ASSOCIATION DIVISION I FEMALE ATHLETES: A QUANTITATIVE AND QUALITATIVE ANALYSIS 48 (2013), [http://nassm.org/files/conf\\_abstracts/2013-081.pdf](http://nassm.org/files/conf_abstracts/2013-081.pdf).

manager, think male.”<sup>68</sup> In addition, research has indicated that female athletes find it easier to receive constructive criticism from male coaches than female coaches.<sup>69</sup> Male coaches were deemed more credible, tougher, less likely to play head games, and less emotional than female coaches. Although a college coach needs to have the following gender-neutral skills—competence, knowledge, the ability to motivate, a good communicator, a relationship builder, trustworthiness, a winner, a teacher, a leader, a recruiter, and a celebrity—gender is playing a major role in who is coaching female athletes today. This “think coach, think male” mentality is impacting whether qualified female coaches get hired and how successful they are once they get a job.<sup>70</sup>

Some argue that the results of the study mirror modern sexism:

Modern sexism is based on the premise that sexist behavior still exists, but the behavior has become so covert and subtle that the practices often go unnoticed or are perceived as normative by both women and men. In essence, modern sexists believe that discrimination is no longer a problem and, as such, have accepted inequality as normative.<sup>71</sup>

As will be addressed *infra*, this is one of several explanations for the acceptance of this reality in American society and why there is no legal remedy in place to correct the issue.

### 5. The Evil of College Recruiting

It is hard to talk about intercollegiate athletics without discussing the role the recruiting process plays in getting young men and women to attend and play for certain schools. The recruiting process ideally is about the student-athlete finding the right fit academically, socially, and for their athletic development. It is also an opportunity for college coaches to market their school, their team, and the atmosphere and describe why the recruit should pick their school. Although the Letter of Intent and NCAA do not allow a student-athlete to transfer if a coach leaves, a large part of the recruiting process is building trust between the head coach and the prospect. Coaches sell recruits on what they

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68. *Id.*

69. See Daniel Frankl & Donald G. Babbitt, III, *Gender Bias: A Study of High School Track and Field Athletes' Perceptions of Hypothetical Male and Female Head Coaches*, 21 J. SPORT BEHAV. 396, 396–407 (1998).

70. Ellen Staurowsky, *Who Does a College Coach Look Like? A Man You Say?*, WOMEN COACHING (June 14, 2013), <http://stream.goodwin.drexel.edu/womenincoaching/2013/06/14/who>.

71. GREENAWALT, FLEISCHMAN & SMEATON, *supra* note 67, at 47.

can do for them and their game—how they will best help the student-athlete achieve his or her goals. Coaches sell the parents on how they will help their son or daughter develop into a young man or woman who is a productive and highly successful member of society.

Unlike men's intercollegiate recruiting, the sexuality of a female coach is often discussed in the recruiting process. A major negative recruiting tool for male and female coaches of women's sports is to emphasize "family" (as a subtle way to signal the coach is not gay or lesbian, whereas others are more direct about the sexual orientation of the coach).<sup>72</sup> Although the younger generation may be more accepting of homosexuality than earlier generations, the money involved in college athletics ensures that the fear of negative recruiting based on the suspicion of homosexuality remains a subconscious factor in the hiring practice.

### III. THE INS AND OUTS OF TITLE IX

#### A. *The Laundry List*

Although Title IX opened doors to education, one of its shortcomings was the time gap between passage and the implementation of standards for compliance. The original compliance date for Title IX was 1975, however, there was no enforcement until the late eighties. In *Grove City College v. Bell*, the United State Supreme Court held that Title IX applied only to those programs that directly received federal aid.<sup>73</sup> Congress confirmed the broad intent of Title IX with the Civil Rights Restoration Act of 1987, which clarified that Title IX applies to all activities if the institution receives federal funds, not just those programs that directly receive the funds.<sup>74</sup>

Title IX requires an institution to "provide equal athletic opportunity for members of both sexes."<sup>75</sup> Title IX does not require equal expenditures for male and female teams or even the same number of teams; instead, it looks at the overall equality of a program.<sup>76</sup> In order to determine if equal opportunities are available, the "Laundry List" of ten non-exhaustive factors was created.<sup>77</sup>

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72. Luke Cyphers & Kate Fagan, *Unhealthy Climate*, ESPN (Jan. 26, 2011), <http://espn.go.com/womens-college-basketball/news/story?page=Mag15unhealthyclimate>.

73. 465 U.S. 555, 603–04 (1984).

74. 20 U.S.C. § 1681 (2016). The Civil Rights Restoration Act of 1987 was enacted to "restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered." 20 U.S.C. § 1687 (2016).

75. 34 C.F.R. § 106.41(c) (2016).

76. *Id.*

77. *Id.* The regulation provides: In determining whether equal opportunities are available the Director will consider, among other factors:



Number five on the list is the “[o]ppportunity to receive *coaching*”<sup>78</sup> and number six is the “[a]ssignment and compensation of coaches.”<sup>79</sup>

With the development of the “Laundry List,” athletic directors were put on notice that one of the factors of evaluation would be the quality of coaching available to female athletes.<sup>80</sup> On the one hand, a steady balance occurred in athletic departments: they needed quality coaches, yet they wanted coaches who would not cause trouble under Title IX. On the other hand, athletic departments that had not merged their women’s and men’s departments took a leading role in maximizing the Laundry List and supplying top-notch intercollegiate athletic experiences for women.<sup>81</sup>

### B. The Sections of Title IX

#### 1. Subpart D – Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

Title IX’s primary focus is the opportunities for students at institutions that receive federal funding. In the athletic realm that is covered in “Subpart D – Discrimination on the Basis of Sex in Education Programs and Activities Prohibited.”<sup>82</sup> As discussed *supra*, the key is the sex of the sport, not the sex of the coach.<sup>83</sup> For any claims of Title IX violations under § 106.41(c)(5): “Opportunity [for] Coaching” or (c)(6): “Assignment and compensation of coaches,” plaintiffs would need to show that the lack of coaches or lower

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(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice time; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; and (10) Publicity.

*Id.*

78. § 106.41(c)(5) (emphasis added).

79. § 106.41(c)(6) (emphasis added).

80. VALERIE M. BONNETTE & LAMAR DANIEL, TITLE IX ATHLETICS INVESTIGATOR’S MANUAL 55 (1990).

81. The University of Texas and the University of Tennessee were two of the leading schools with split athletic departments. The leadership of each school, specifically Donna Lopiano and Joan Cronan, respectively, were recognized nationally to have paved the way for the women’s athletic experiences at the collegiate level.

82. 34 C.F.R. § 106.41(c) (2016).

83. *Id.*

compensation of coaches had a negative effect on the athletes.<sup>84</sup>

Because a variety of skills go into making a good coach, the Title IX Investigator's Manual recommends looking at a pattern of assigning less qualified coaches to the women's program.<sup>85</sup> Under Title IX regulations, the quality of coaches, not the gender of coaches, is the focus.

2. Subpart E – Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited.

Title IX Subpart E – Discrimination on the Basis of Sex in Employment in Educational Programs and Activities Prohibited states:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in *employment, or recruitment, consideration, or selection therefor*[sic], whether full-time or part-time, under any education program or activity operated by a recipient which receives Federal financial assistance.<sup>86</sup>

The statute continues in § 106.51(a)(2) to state that all employment decisions shall be made “in a nondiscriminatory manner and shall not limit, segregate, or classify . . . employees in any way which could adversely affect . . . employment opportunities or status because of sex.”<sup>87</sup> The above regulations apply to rates of pay and job assignments.<sup>88</sup> In addition, Title IX addresses discrimination in hiring and recruitment<sup>89</sup> and prohibits sex-based distinctions in pay.<sup>90</sup>

Unlike Subpart D, which is directed at providing equal opportunities to student-athletes, Subpart E is directed at equity for all employees at institutions receiving federal funding. If the athletic department of a university were to look at head coaches alone, one in five would be female.<sup>91</sup> Because § 106.53 directly covers discrimination in hiring and recruitment practices, the question is why has Title IX Subpart E not been used to address the decline in female head

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84. BONNETTE & DANIEL, *supra* note 80, at 55.

85. *Id.* at 58.

86. 34 C.F.R. § 106.51(a)(1) (2016) (emphasis added).

87. § 106.51(a)(2).

88. § 106.51(b)(3)–(4).

89. § 106.53.

90. § 106.54.

91. ACOSTA & CARPENTER, *supra* note 5, at 18.

coaches?

The challenge is that showing discrimination in hiring and recruitment practices is not a snapshot; rather, a pattern needs to be established. In the job market, an individual applicant is usually only interested in a position at a particular school once, or at most twice. In addition, there are too many “other” factors that schools could point to in order to explain their hiring practices. For example, the common answer from athletic administrators is that they are looking for “the right fit.” If the NBA is able to use female officials, it is hard to believe that college athletics cannot find qualified coaches to run either male or female teams.<sup>92</sup> A hiring decision maker can make a good-faith effort to hire the best person for the job, not the best man or best woman for the job. The legal issue is that he or she cannot base their decision on gender. In addition, coaches are averse to suing their current or potential employer since they would be committing “coaching career suicide.”

#### IV. CURRENT CASES THAT MAY ALLOW THE REACH OF TITLE IX TO EXTEND TO SECOND GENERATION BIAS

##### *A. University of Iowa Women's Field Hockey*

###### 1. Background

On August 4, 2014, the University of Iowa fired its field hockey coach, Tracey Griesbaum. The university performed a comprehensive review of the field hockey program and felt it was time for a change in leadership. Field hockey, under her tutelage, was one of Iowa's leading programs. She has since sued the university claiming disparate treatment between men's and women's coaches. In a letter to the University Board of Regents, a retired University of Iowa coach wrote:

There appears to be a double standard of discipline for head coaches within the athletic department related to either behavior or complaints made by student[-]athletes and/or parents and that double standard has created a climate of fear and intimidation for female head coaches, making it impossible to discipline student-athletes without fear of employment consequences.<sup>93</sup>

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92. Ben Bolch, *Violet Palmer is Just Another NBA Official and That's a Good Thing*, L.A. TIMES (Apr. 21, 2012), <http://articles.latimes.com/2012/apr/21/sports/la-sp-bolch-nba-20120422>.

93. *The Tracey Griesbaum Story*, MAX FIELD HOCKEY (Dec. 11, 2014), <http://maxfield-hockey.com/news/tgiowa/tg>. Since 2010, five female head coaches have been fired or invited to resign

Griesbaum charged that her firing stemmed from both her sexuality and the way student-athletes hear constructive criticism. Subsequent to the filing of the suit, the University of Iowa reassigned Griesbaum's partner, Senior Associate Athletic Director Jane Meyer, stating, "[K]eeping Meyer in the department's leadership presented challenges as the school prepared to defend against Griesbaum's claims of bias against gay, female coaches."<sup>94</sup> In terms of the accusations of student-athlete mistreatment, the team's athletic trainer wrote to the Board of Regents, "[A]llegations are false or exaggerated and made by a few 'individuals who did not particularly like a style or were uncomfortable with an exacting expectation.'"<sup>95</sup>

## 2. OCR Complaint: *Ackers v. University of Iowa*

The most significant impact of Title IX may be on the horizon with the civil rights complaint filed by four female field hockey student-athletes (three current and one graduating senior), who claim that they have been subject to the discriminatory application of policies and practices within the University of Iowa.<sup>96</sup> Their complaint states,

These practices have and will continue to result in the removal of highly qualified female coaches, including but not limited to Complainants' coach Tracey Griesbaum . . . . The University of Iowa's actions are thereby denying female student[-]athletes the benefits of their student-athlete experience because of sex in violation of Title IX.<sup>97</sup>

The complaint distinguishes seven key practices motivated by sex or gender stereotypes that harm student-athletes:

### 1. The University investigates and treats differently male

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or retire, whereas no punishments were assessed against the football coaches for the Rhabdomyolysis incident in 2011. *Id.*

94. Ryan J. Foley, *Iowa Releases Job Assignment for Ex-Associate AD*, SALON (Dec. 11, 2014), [http://www.salon.com/2014/12/12/iowa\\_releases\\_job\\_reassignment\\_for\\_ex\\_associate\\_ad/](http://www.salon.com/2014/12/12/iowa_releases_job_reassignment_for_ex_associate_ad/).

95. *Griesbaum Denies Bullying Players*, ESPNW (Aug. 18, 2014), [http://espn.go.com/college-sports/story/\\_/id/11371458/tracey-griesbaum-denies-bullying-iowa-hawkeyes-field-hockey-players](http://espn.go.com/college-sports/story/_/id/11371458/tracey-griesbaum-denies-bullying-iowa-hawkeyes-field-hockey-players).

96. Kate Fagan, *Why the Iowa Field Hockey Title IX Complaint Is a Huge Deal*, ESPN (Feb. 5, 2015), <http://espn.go.com/espnw/news-commentary/article/12283119/why-iowa-field-hockey-title-ix-complaint-huge-deal>.

97. Letter from Student-Athletes to Dir. of Office for Civil Rights, U.S. Dep't of Educ. 1 (Jan. 28, 2015), [http://espn.go.com/pdf/2015/0204/espnw\\_complaintofstudentathletes.pdf](http://espn.go.com/pdf/2015/0204/espnw_complaintofstudentathletes.pdf).

and female student-athletes who raise concerns about their athletic experience.

2. The University investigates and treats differently male and female coaches who are the object of complaints made by male and female student-athletes.
3. The University engages in different practices and standards when investigating female coaches.
4. The University permits males to engage in different coaching methods and treatment of athletes than females.
5. The University generally holds female coaches to a higher or different standard than male coaches.
6. The University has engaged in a pattern of removing highly qualified female coaches because of gender.
7. The University refuses to investigate allegations of discrimination or violations of Title IX when raised by student-athletes.<sup>98</sup>

The complaint applies the law to a phenomenon that is seen in the daily lives of coaches—student-athlete complaints and the double standard female coaches face when using the same coaching methods as men. The complaint describes the seven issues listed above as “gender biases, double standards and stereotypes” serving as the “the primary source of continued inequality in collegiate athletics.”<sup>99</sup>

The logic of the complaint is that a female student-athlete, or her parents, holds female leaders to a different standard than males. The student’s or parent’s complaint is not gender bias, rather *the reaction of the administration to the complaints of female student-athletes is the major source of gender bias*. The result is the administration makes a choice about the type of women (hard or soft persona; strong or docile)<sup>100</sup> rather than the type of person. For example, female coaches are supposed to care for their student-athletes differently than compared to men. “[F]emale student[-]athletes should be entitled to the same level of competitiveness experienced by males and it certainly means female student[-]athletes should not be coddled or dismissed as secondary to male

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98. *Id.* at 1–2. The University of Iowa, by discriminating in these areas, is alleged to be in violation of Title IX. 20 U.S.C. §§ 1681–88 (2016); 34 C.F.R. Pt. 100 (2016).

99. *Id.* at 2.

100. See “*Too Strong for a Woman*”—*The Five Words That Created Title IX*, BERNICE SANDLER, <http://www.berniceandler.com/id44.htm> (last visited June 9, 2016).

student[-]athletes based on outdated or patronizing views of the role of women.”<sup>101</sup>

Gender bias can hit women differently. For example, it may appear that one woman benefits from an action taken against another woman because of gender bias, but that is still gender bias. If that gender bias hurts one woman, it will also hurt another.<sup>102</sup>

Gender discrimination occurs when a female coaching women uses the exact same coaching methods as male coaches. Gender discrimination

undermines the right of female student[-]athletes to receive similar experience to male student[-]athletes simply because of their sex and/or the sex of their coach.

. . . .

. . . Removing Women’s Field Hockey Coach Tracey Griesbaum because of her gender is just as much a violation of Title IX as taking away the team’s uniforms because of gender.<sup>103</sup>

The issue is independent of who replaces a coach. The issue is that a coach was removed because of sex or gender stereotypes. For example, when a coach’s methods appear harsh, mean, or intimidating to a female student-athlete because of gender stereotypes held by the student-athlete, then the coach is being fired because of the gender of the student-athlete. When a coach’s methods appear harsh or mean because of a double standard or gender stereotype to the female coach, then the coach is being fired because of gender.<sup>104</sup> This double standard is also described as female coaches needing to exhibit male traits to be accepted as coaches, but then being harmed or punished by a failure to step away from male behavior.

Although there may be a bias related to the sexual orientation of the coach as well in this case, it is clearly connected to gender bias, stereotype, and double standards. The complaint includes how Iowa has failed to address sexual assault complaints, and the pattern of coaches that have been removed from 2008 to 2014. Although the goal of the complaint is to show that Iowa failed to act appropriately in a variety of situations in the areas of gender equity, the interpretation the Office for Civil Rights (OCR) makes regarding issues one through five above will have a tremendous impact on the future of both female

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101. Letter from Student-Athletes to Dir. of Office for Civil Rights, *supra* note 97, at 3.

102. *Id.*

103. *Id.* The attorney who composed the complaint could have used any of the categories on the Title IX “Laundry List.”

104. *Id.*

athletes and female coaches.

In response to the complaint, on May 22, 2015, the U.S. Department of Education's OCR informed the University of Iowa that it would conduct an investigation.<sup>105</sup> Tom Newkirk, an attorney for Griesbaum who also assisted the students in writing the OCR complaint, sees the investigation as a groundbreaking decision for the OCR, "You have four student[-]athletes who are challenging the removal of their coach because she's a woman. No one has done that before."<sup>106</sup>

#### A. *University of Minnesota Duluth*

Shannon Miller, the highest paid women's ice hockey coach in the country, who won five NCAA titles, held a .712 winning percentage over sixteen seasons and had a team that was ranked seventh in national polls during her tenure at the University of Minnesota Duluth, was informed in December 2014 that her contract would not be renewed. She has hired Attorney Dan Siegel to represent her in a Title IX lawsuit against the school.<sup>107</sup> The university claims that it based its decision on financial and other considerations. The financial claim states that the university was not getting a return on its investment. This led Tucker Institute associate director Nicole LaVoi to state,

You would never tell [Alabama football coach] Nick Saban, "You're paid too much, therefore we're going to have to let you go." LaVoi said, "Usually, it's the converse argument, where [a school] wants to pay high-performing coaches what they're worth. This is a game-changer for women coaches, and not in a good way."<sup>108</sup>

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105. Ryan J. Foley, *APNewsBreak: Feds Open Broad Bias Probe into Iowa Athletics*, U.S. NEWS (Feb. 12, 2016), <http://www.usnews.com/news/sports/articles/2016-02-12/apnewsbreak-feds-open-broad-bias-probe-into-iowa-athletics>.

106. *Id.*

107. Rachel Blount, *Minnesota Duluth Women's Hockey Coach Shannon Miller Says Dismissal Violates Title IX*, STAR TRIB. (Feb. 13, 2015), <http://www.startribune.com/sports/gophers/291785391.html>; see also Dan Siegel, SIEGEL & YEE, <http://www.siegelyee.com/dansiegel.html> (last visited June 9, 2016) (documenting the bio of Attorney Dan Siegel who represented Lindy Vivas and Stacy Johnson-Klein in the two largest Title IX recovery awards).

108. Blount, *supra* note 107.

Duluth reported a loss of more than \$1.4 million on women's hockey last year, not an unusual figure for the nonrevenue sport but a large hit to the school's athletics budget (\$9.87 million). Minnesota lost more than \$1.8 million and Wisconsin over \$1.2 million, but those two departments operate with about \$100 million.

As of February 20, 2015, thirteen Minnesota State senators have become involved in the matter and have challenged the university's reasoning.<sup>109</sup> They inquired why the men's coach, who makes more in salary than Coach Miller despite having a lower winning percentage, was not let go. In addition, they warned the university that a violation of Title IX would have a severe consequence on the state's higher education system.

Although formal litigation has not been filed to date, the thought that a school could eliminate a head coach based on their return of investment, rather than level of success, would show a difference in how the university holds female coaches to a higher or different standard than male coaches. This is the same as claim number four in the University of Iowa case. The University of Minnesota Duluth also mentions "other factors." Once those become public, they may raise similar issues to the University of Iowa in regard to coaching methods.

*B. Historical Cases to Better Help the Analysis of Iowa and Minnesota Duluth*

The following cases highlight the issues that the courts have addressed in college athletic employment issues and some that are in pre-litigation.

1. Fresno State University

The biggest Title IX award occurred in 2007, when Stacy Johnson-Klein, the former head women's basketball coach at Fresno State, filed a sex-discrimination lawsuit and was awarded \$19.1 million in a jury trial.<sup>110</sup> She was fired after complaining about gender equity at the school. The jury trial awarded as follows:

- Economic losses from Johnson-Klein's firing on March 2, 2005, to the trial's start: \$634,254.00
- Future economic losses if she hadn't been fired: \$4,440,419.00

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*Id.*

109. Letter from Members of the Minn. State Senate to Eric Kaler, President, Univ. of Minn., and Lendley Black, Chancellor, Univ. of Minn. Duluth (Feb. 20, 2015), <http://www.duluthnews Tribune.com/sites/default/files/MillerLetter.pdf>.

110. *Fired Fresno State Coach Wins \$19M in Sex-Discrimination Lawsuit*, FRESNOBEE (Dec. 6, 2007), <http://www.csun.edu/pubrels/clips/Dec07/12-07-07K.pdf>.



• Noneconomic suffering from the date of the firing to the trial's start:	\$3,000,000.00
• Noneconomic suffering Johnson-Klein will suffer for the rest of her life:	<u>\$11,000,000.00</u>
<b>Total:</b>	\$19,074,673.00 <sup>111</sup>

Even though the Johnson-Klein lawsuit should have been a clear warning to colleges to treat women equally and to adhere to federal gender-equity law, a large number of suits still exist.

Part of the decision in the Johnson-Klein case was the pattern of gender equity issues at Fresno State. It followed a \$3.5 million settlement to a sex discrimination and retaliation case filed in 2004 by Diane Milutinovich, a former associate athletic director. In addition, former Fresno State volleyball coach, Lindy Vivas, was awarded over \$5 million in a jury trial and settled for \$4.5 million in exchange for no appeal by the university in her retaliation firing based on her advocating for gender equity.<sup>112</sup>

## 2. University of Tennessee

The University of Tennessee, one of the gold standards in women's athletics and the last Division I school to merge its women's and men's athletic departments, has had a number of gender-equity lawsuits as a result of merging the men's and women's athletic departments. When the merger occurred, fifteen people (twelve women and three men) received lay-off letters. In addition, women who held leadership and supervisory positions in the women's

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111. *Id.* The Johnson-Klein case was the third sex discrimination case against Fresno State in five months. *Id.* In July, a jury awarded \$5.85 million to a former volleyball coach who sued for sexual discrimination; a judge later reduced that award to \$4.5 million. Brad Wolverton, *Jury Awards \$19.1-Million to Former Fresno State Coach in Sexual-Discrimination Case*, FRESNOBEE (Dec. 7, 2007), <http://www.csun.edu/pubrels/clips/Dec07/12-07-07K.pdf>. In October, Fresno settled a sex-discrimination case filed by a former athletics official for \$3.5 million. *Id.*; see also Verdict & Settlement Summary, *Johnson-Klein v. Bd. of Trs. of Cal. State Univ.*, JVR No. 808680, 2007 WL 4954472, 05CECG02645 (Cal. Super. Ct. Dec. 1, 2007); Libby Sander, *Fresno State U. Settles Sex-Discrimination Lawsuit for \$3.5-Million*, CHRON. HIGHER EDUC. (Oct. 15, 2007), <http://chronicle.com/daily/2007/10/358n.htm>.

112. See Taryn Wilgus Null, *Fresno State Pays Big for Discrimination*, NAT'L WOMEN'S L. CTR. (Oct. 19, 2007), <http://www.nwlc.org/our-blog/fresno-state-pays-big-discrimination>. In response to the pattern of discrimination at Fresno State, California State Sen. Dean Florez formed a committee to investigate abuses of Title IX and gender discrimination in athletic programs at California public universities. See *Vivas v. Bd. of Trs. of Cal. State Univ.*, No. 06CECG00440, 2007 WL 2247078 (Cal. Super. Ct. 2007).

athletics department were stripped of those responsibilities and supervised by less experienced individuals. Athletic trainer Jenny Moshak and Sports Information Director Debby Jennings filed two of the suits. Jennings alleged age and sex discrimination and settled after filing in district court. Moshak alleged the university set up a “testosterone wall” that prevented female employees from earning equal pay.<sup>113</sup> She claimed that she received less compensation than her male counterparts either because of her gender or due to her association with women’s teams. She sued the university on the basis of sex discrimination and retaliation. The cases occurring at Tennessee support the notion that discrimination still exists in college athletics. Tennessee insists there are “legitimate, nondiscriminatory, and non-retaliatory reasons” for how Jennings and Moshak were treated. Title IX lawyer Kristin Galles says, “It’s a window into the discriminatory decision-making that happens every day in college athletics. The fact that it is happening at a school like this really highlights the extent to which discrimination is a problem everywhere.”<sup>114</sup> The case settled in January 2016 with the University of Tennessee paying \$375,000 plus attorney’s fees to Moshak.

### 3. San Diego State University

In November 2007, the female coach of the San Diego State University women’s swimming team sued the school when she was relieved of her duties. She claimed the discharge was in retaliation for fighting to build an on-campus pool (the old pool was permanently closed in 2000). She alleged unequal and inadequate facilities, pay, practice times, and administrative support. The two sides settled for \$1.45 million. The settlement includes \$317,420 lump sum, \$682,580 in an annuity, and \$450,000 for attorney’s fees.<sup>115</sup>

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113. *Trial Date Set in Tennessee Discrimination Lawsuit*, USA TODAY (May 16, 2014), <http://www.usatoday.com/story/sports/ncaaw/2014/05/16/trial-date-set-in-tennessee-discrimination-lawsuit/9179107/>.

114. Nina Martin, *Lawyer: University of Tennessee Lawsuits Epitomize ‘Massive Sex’ Bias in College Sports*, BUS. INSIDER (Nov. 8, 2013), <http://www.businessinsider.com/sex-discrimination-suits-against-university-of-tennessee-2013-11>. Debby Jennings went on to settle for \$320,000 in October 2014 (\$116,396 for attorneys’ fees, \$30,540.58 to be paid to Jennings as alleged wage-based damages, and \$173,063.42 to be paid to Jennings for alleged pain and suffering). *Id.*; MJ Slaby, *Athletics Department Lawsuit Settlement to Cost UT at Least \$1.05M*, KNOXVILLE NEWS SENTINEL (Jan. 4, 2016), <http://www.knoxnews.com/sports/vols/womens-basketball/ut-settles-athletics-department-pay-discrimination-lawsuit-for-750K-28868498-38c3-7a11-e053-0100007f-364143791.html>. (In a joint statement Attorney Keith Stewart and Attorney Lisa Banks, who represented the former UT employees stated, “The resolution of this matter stands as a testament to the importance of equality for women in sports and those working with women in sports. This settlement sends a clear message to collegiate decision-makers nationwide that disparity in pay, opportunity, funding, participation or otherwise is unacceptable in this day and time.”)

115. Brent Schrottenboer, *SDSU, Ex-Swim Coach Reach \$1.45 Million Settlement*, SAN DIEGO

San Diego State is facing another lawsuit based on the 2013 firing (or insisted retirement) of women's basketball coach Beth Burns. At first, the school said that Coach Burns was fired for allegedly striking a subordinate during a game.<sup>116</sup> Burns insists the forced retirement was due to her complaints about the disparate treatment of the women's basketball program.<sup>117</sup>

#### 4. The University of Texas

Bev Kearney, the nationally-known track and field coach, was fired after university officials learned of an inappropriate relationship with one of her former athletes.<sup>118</sup> Kearney filed a lawsuit claiming discrimination on the basis of sex and race. She argued that males in supervisory positions facing the same accusations were not punished in the same manner. She argued that Major Applewhite (UT Alum and football assistant coach), a UT athletic administrator, and other university employees, including law school professors, had inappropriate relationships with students or direct subordinates and were not subjected to termination (or meaningful discipline).<sup>119</sup>

#### C. What Do the Suits Tell Us

The above law suits address coaches or support staff of women's programs after they lose their jobs. In order to increase the number of women coaching women, two things need to occur: (1) women need to maintain their current positions and (2) more women need to view coaching as a viable career.

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UNION TRIB. (Sept. 26, 2008), <http://www.sandiegouniontribune.com/sports/aztecs/20080926-9999-1s26azsuit.html>.

116. R. Stickney, *Ex-Basketball Coach Beth Burns Files Wrongful Termination Lawsuit*, NBC 7 SAN DIEGO, <http://www.nbcsandiego.com/news/sports/Basketball-coach-Beth-Burns-Lawsuit-San-Diego-State-University--246233331.html> (last visited June 9, 2016).

117. Christian Dennie, *Burns v. San Diego State: Former Women's Basketball Coach Sues SDSU for Wrongful Termination*, BARLOW GARSEK & SIMON, LLP (Oct. 16, 2013, 8:00 PM), <http://www.bgsfirm.com/college-sports-law-blog/burns-v-san-diego-state-former-womens-basketball-coach-sues-sdsu-for-wrongful-termination>. Since the suit is in California state court, it does not evoke Title IX. The claims are (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealings, (3) retaliation in violation of the California Fair Employment and Housing Act, (4) wrongful termination, (5) violation of Labor Code § 1050, (6) intentional infliction of emotional distress, and (7) negligent infliction of emotional distress. *Id.*

118. Kirk Bohls & Suzanne Halliburton, *Bev Kearney Files \$1 Million Suit Against Texas*, STATESMAN (Nov. 14, 2013, 11:06 AM), <http://www.statesman.com/weblogs/bev-beat/2013/nov/14/bev-kearney-files-suit-against-texas/>.

119. *Id.*; see also Chip Brown, *Details of the Bev Kearney Discrimination Lawsuit*, RIVALS (Nov. 14, 2013), <https://texas.rivals.com/content.asp?CID=1575147>. Applewhite, for example, had his pay frozen for twenty months, while Kearney was asked to resign. *Id.* Part of Kearney's double standard claim mentions the former volleyball coach, Jim Moore, who the university hired even knowing that he married one of his former student-athletes. *Id.*

The concern is how to increase the number of women getting those jobs in the first place. In fact, that is the motivation for one of the students at the University of Iowa to file the complaint—she hopes to be a coach after college. In most termination or hiring situations, the “real” motivation for the action may not become public. Athletic departments often use the “we’ve decided to move in a different direction” or “we are not getting a return on our investment” excuse to explain their firing decisions. A significant concern is that not all instances are given national or regional attention because complaints are not filed, either because a coach does not want to commit career suicide or because any settlement offer includes a confidentiality, non-disparagement clause—otherwise known as “forced” resignations. The suits are important in showing a pattern of successful coaches and administrators who have been relieved of their jobs once they became vocal advocates of gender equity for their teams.<sup>120</sup> They are also important in demonstrating that an administrator may look for any reason to release a coach, even if they are successful. That reason may include reacting to the complaints of student-athletes and/or their parents differently than they would for male coaches of women’s teams or male coaches of male student-athletes.

Several women’s athletics advocates have looked at the decline in female college coaches and blamed it on homophobia.<sup>121</sup> Pat Griffin relies on practically the same line of cases, as discussed *supra*, to highlight a pattern of sex and sexual orientation discrimination in college athletics. She goes so far as to say,

the public rationale offered by athletic administrators for their decisions in each of these cases masks a deeper and more fundamental problem in college athletics: misogyny, sexism and homophobia. This trifecta of hostility towards women in athletics is made more threatening in an athletic climate in which financial resources are strained to the max and athletic administrators in schools large and small buy into the pipe dream of cultivating big time football (and men’s basketball) as the salvation of cash strapped athletic departments (Only about 20

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120. Mollie Lam, *Moshak v. University of Tennessee: Discrimination Too Common in College Athletics*, AAUW, <http://www.aauw.org/resource/moshak-v-university-of-tennessee/> (last updated Jan. 7, 2016).

121. Jim Buzinski, *Homophobia Among Chief Reasons for Decline in Female College Coaches*, SB Nation: OUTSPORTS (Apr. 2, 2012, 6:00 AM), <http://www.outsports.com/2012/4/2/4052862/homophobia-among-chief-reasons-for-decline-in-female-college-coaches>; *see also* Pat Griffin, *College Sports’ War on Female Coaches*, SB Nation: OUTSPORTS (Jan. 29, 2015, 3:18 PM), <http://www.outsports.com/2015/1/29/7923853/women-coach-college-sports-pat-griffin>.

schools, all in the Football Bowl Subdivision, actually make more money than they spend on athletics).<sup>122</sup>

The fundamental problem is deeper than misogyny, sexism and homophobia. Those are simply the present day labels to describe discrimination. As lawyer and former Olympian Nancy Hogshead-Makar states, “[S]exism and homophobia are fraternal twins. They punish deviations from gender norms hurting everyone.”<sup>123</sup> As the *Ackers* complaint against the University of Iowa states, there is a bias, double standard, and discrimination that is based on gender.

A movement is starting to bring attention to the number of women coaching female student-athletes. In July of 2015, the Alliance of Women Coaches held a program in Kansas City to address the concern that there is a record high number of female participation in sports, yet only forty percent of women’s teams have female head coaches. The program, entitled *The War on Women Coaches: Legal, Organizational, & Societal Issues Facing Women in the Coaching Profession*, is a start; however, the key for change will be at the grassroots level with more women coaching both male and female youth teams.<sup>124</sup> In an interesting development, a few women have achieved assistant coaching positions in U.S. men’s professional leagues, including Becky Hammon with the NBA San Antonio Spurs, Nancy Lieberman with the NBA Sacramento Kings, Jen Welter in a coaching internship with the NFL Arizona Cardinals, and Rachel Balkovec as an assistant strength and conditioning coach with the MLB St. Louis Cardinals.<sup>125</sup> The significance of having four female role models in men’s professional sports is priceless for both male and female

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122. Griffin, *supra* note 121.

123. Nancy Hogshead-Makar (@Hogshead3Au), TWITTER (Apr. 24, 2015, 8:56 PM), <https://twitter.com/hogshead3au/status/591813002443227136>.

124. See ALL. OF WOMEN COACHES, SCHEDULE 1 (2015), <http://allianceofwomenscoaches.org/wp-content/uploads/2015/06/2015-Huddle-Schedule-as-of-6.30.15.pdf>. “The War on Women Coaches” panel included Kate Fagan (ESPN), Nicole LaVoi (Tucker Center at University of Minnesota), Kristin Galles (Title IX attorney), and Nancy Hogshead-Makar (attorney, advocate, and COO of Champion Women). *Id.* In addition, Shannon Miller (former UMD Ice Hockey Coach) and Tracey Griesbaum (former Iowa Field Hockey Coach) shared remarks. *Id.*

125. David Berri, *Why the NBA Should Give Female Coaches Like Becky Hammon a Shot*, VICE SPORTS (July 22, 2015), [https://sports.vice.com/en\\_us/article/why-the-nba-should-give-female-coaches-like-becky-hammon-a-shot](https://sports.vice.com/en_us/article/why-the-nba-should-give-female-coaches-like-becky-hammon-a-shot); Sam Amick, *Kings to Hire Nancy Lieberman as Second Female NBA Assistant Coach*, USA TODAY (July 31, 2015), <http://www.usatoday.com/story/sports/nba/kings/2015/07/31/nancy-lieberman-second-female-assistant-coach-sacramento-kings/30922651/>; Bob Baum, *Coach Jen Welter Calls Groundbreaking NFL Work ‘Fantastic’*, PRO32: HEAD TO HEAD (Aug. 28, 2015), <http://pro32.ap.org/hermannadvertiser/courier/article/coach-jen-welter-calls-groundbreaking-nfl-work-fantastic>; Lindsay Berra, *Cards Have Pioneer in Female Strength Coach Balkovec*, MLB (May 30, 2014), <http://m.mlb.com/news/article/77462528/cards-have-pioneer-in-female-strength-coach-rachel-balkovec>.

athletes and fans of all ages. However, in college athletics, it is still the case that men occupy the majority of head coaching jobs in that only two of ten head coaches at the Division I level in all sports are women.<sup>126</sup> For the first time since 1993, the NCAA, in April 2015, enacted a Gender Equity Task Force with the mission of moving “the needle on gender equity in college sports.”<sup>127</sup> Leadership is gender free, yet, society has created the assumption that men are better leaders.<sup>128</sup> In college athletics, men have capitalized on leading decision makers to believe that men are more valuable in the leadership market.

## V. RETALIATION

In 2005, the U.S. Supreme Court, in a 5–4 decision, ruled that an integral aspect of Title IX is that a complainant cannot be retaliated against.<sup>129</sup> Justice Sandra Day O’Connor, writing for the majority, stated that Title IX’s effectiveness is contingent upon the willingness of students, parents, coaches, and others to challenge gender inequality. The *Jackson v. Birmingham Board of Education* decision is significant because the retaliation protects challengers to gender inequality and goes beyond a plaintiff’s personal status claim for inequality.

Retaliation, however, is not expressly covered in Title IX, as it is in Title VII. Title VII has two clauses addressing retaliation: “participating” in formal enforcement mechanisms and informally “opposing” unlawful activity by complaining internally to an employer. Title VII uses the “reasonable belief” doctrine. It calls for an employee to have a reasonable belief that the conduct is discriminatory in order for that employee to be protected from retaliation.<sup>130</sup> With Title IX, the question of the extent of retaliation should depend on perception of a violation and not on actual violation to trigger protection from Title IX. A sincere and honest challenge should be protected.

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126. NCAA, Race, & Gender Institutional Database (Alliance of Women Coaches states that across all NCAA sports (for both men and women), women hold only twenty percent of top coaching jobs). That means eight out of ten head coaching jobs are held by men. Women coach just four percent of men’s teams—and only forty percent of women’s teams have women for head coaches. ALLIANCE OF WOMEN COACHES, [www.allianceofwomenscoaches.org](http://www.allianceofwomenscoaches.org) (last visited June 9, 2016).

127. Rachel Stark, *Reformed Group Aims to Tip Scales on Equity*, NCAA.ORG (July 21, 2015), <http://www.ncaa.org/champion/reformed-group-aims-tip-scales-equity>.

128. EVA MARIKOVA LEEDS & MICHAEL A. LEEDS, HANDBOOK ON THE ECONOMICS OF WOMEN IN SPORTS 281 (2015).

129. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005). Roderick Johnson, an African-American male who served as the girls’ basketball coach, complained that the girls’ team did not have access to the same training room, equipment, travel, and gym facilities as the boys’ team. *Id.* He complained and was relieved of his coaching duties. *See id.* at 171–72.

130. *See* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 76–86 (2005) (providing a general overview of the Reasonable Belief Doctrine and its application to Title VII).

Similarly, Title IX law is still developing regarding what is considered unlawful retaliation. In *Burlington Northern & Santa Fe Railway Co. v. White*, the U.S. Supreme Court created a test for Title VII: whether the retaliatory action taken would likely deter a reasonable employee from complaining.<sup>131</sup> This test should be evaluated from the “perspective of a reasonable person in the plaintiff’s position.”<sup>132</sup> The Title VII test is consistent with Title IX because students, parents, coaches, and others should not be discouraged from enforcing Title IX. The Iowa complaint is the first to include active student-athletes. The lawsuits, discussed *supra*, involve coaches and administrators after termination or forced resignation.

Student-athletes are the best means for change because the college experience should be all about them. However, it can be very intimidating for student-athletes to bring Title IX complaints, especially when a scholarship is involved. Peer pressure, acceptance, and anxiety about retaliation are also real concerns. Coaches, however, are in an even more vulnerable position, as it is harder to both get and keep jobs. Being insistent regarding Title IX does not help their job security, ability to operate within the “old boys” network, or their attractiveness to future employers.<sup>133</sup> What it takes to chill employees may be different in college athletics than in other industries, as seen in *Burlington Northern & Santa Fe Railway*.

Title IX is gender blind. In other words, as long as sex is not “consciously considered” in the selection of a coach, no gender discrimination has occurred under the law.<sup>134</sup> Female coaches are not given a benefit for being role models for female student-athletes under Title IX.

The underrepresentation of women in college coaching positions is based on an unconscious bias, exclusionary recruiting networks, inflexible work structures, and a lack of mentoring and institutional support.<sup>135</sup> In addition, the competition for coaching positions is greater for women because they are competing with men and women to coach women’s teams and men can compete for twice as many positions.<sup>136</sup> Not only do women have to show their skill and interest, they also have to work to gain acceptance in the “old boy’s network” of competitive athletics.<sup>137</sup>

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131. 548 U.S. 53, 69–70 (2006).

132. *Id.* at 71.

133. Deborah L. Rhode & Christopher J. Walker, *Gender Equity in College Athletics: Women Coaches as a Case Study*, 4 STAN. J. C.R. & C.L. 1, 14 (2008).

134. DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN’S SPORTS REVOLUTION 203 (2012).

135. Rhode & Walker, *supra* note 133.

136. *Id.* at 30.

137. Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513, 527 (2007).

The small number of women coaching women is a societal issue that both men and women need to join together to repair. Recognition of possible differences in how student-athlete complaints are handled and whether coaching methods are accepted for men, but not women, is a first step. The best way to combat the old boy's network and the feeling of comfort athletic directors may have with a male coach is to have more females in athletic leadership positions. Similar to coaching, these are extremely competitive positions. In addition, it is important that a female administrator does not get pigeonholed into a dead-end type of position in athletic departments like compliance and academic advising. Likewise, more opportunities need to be created to have quality female head and assistant coaches interact with administrators. A female administrator with the title "Senior Women's Administrator" walks a fine line: she needs to support women's athletics but cannot afford to be "labeled" as a squeaky wheel or pro-female at the expense of male athletics. Male athletic directors need to recognize the fine line and support women in order to make the line wider. Administrators and coaches should also have conversations regarding coaching methods and how the methods are about coaching athletes, not about coaching female versus male athletes.

Male athletic directors may not consciously hire more male coaches, however, it is reality. Sociologists refer to this phenomenon as insider preferences.<sup>138</sup> This same in-group discrimination is seen in women being underrepresented in coaching.<sup>139</sup>

Coaching and athletic department administrative positions are determined on merit. However, merit is subjective and can be hidden in "the best fit" and motivated by personal or networking relationships. Male leaders have the belief that men play sports so it is only natural for them to hold major leadership positions.<sup>140</sup> What is wrong with this view, however, is that it completely discounts the fact that women play sports as well. Women today need to be more qualified than their male peers to be in contention for, attain, and retain coaching positions.<sup>141</sup> Going forward, women need to continue to be more qualified and find ways to use their networking skills to break into the network of decision makers. Athletic directors need to be more receptive to expanding

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138. George B. Cunningham & Michael Sagas, *Access Discrimination in Intercollegiate Athletics*, 29 J. SPORT & SOC. ISSUES 148, 156–57 (2005).

139. *Id.* at 157.

140. Sports agent Jeffrey Moorad, in answering a question on how women can best progress in the sports world, suggested that the best way is through journalism and that men have an advantage because they play sports. *Game Changers: An Insider Look into a Volatile Year in Sports*, 2015 JEFFREY S. MOORAD SPORTS L.J. SYMP. (Apr. 11, 2015), <https://vums-web.villanova.edu/Media-site/Play/d05bdd335f9746cca5973b7cf988de5a1d>.

141. Rhode & Walker, *supra* note 133, at 23.



their network to include prospective female coaches.

## VI. THE EQUAL PAY ACT

It is impossible to consider the implications of the University of Minnesota Duluth and Shannon Miller situation without considering the Equal Pay Act (EPA). The EPA “*prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions.*”<sup>142</sup> An employer has four statutory defenses: (1) seniority system; (2) a merit system; (3) a system linking wages to quantity or quality of production; and (4) factors other than sex. Job content, not job title, determines whether jobs are substantially the same or not. A case involving coaching turns on whether a plaintiff can show that jobs coaching men and women are similar enough to meet the equal standard.

In 1994, Marianne Stanley, one of the most decorated coaches in women’s basketball, sued the University of Southern California (USC) and challenged the difference in pay between head coaches of women’s teams and head coaches of men’s teams.<sup>143</sup> Under the EPA, Coach Stanley argued that her job “require[d] equal skill, effort, and responsibility and [is] performed under similar working conditions.”<sup>144</sup> Although the men’s and women’s basketball head coaching positions shared common core tasks of administering the program and recruiting prospective student-athletes, the court granted USC’s motion to dismiss, holding that the men’s program at USC had greater revenue-generating responsibilities, greater media and spectator pressure to win, and generated more university revenue.<sup>145</sup>

Judge Pregerson dissented from the majority’s decision to dismiss the case, stating:

By focusing on the difference between Stanley’s and

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142. 29 U.S.C. § 206(d) (2016) (emphasis added). It is the only federal statute that predates Title VII and deals with employment discrimination. *The Equal Pay Act of 1963*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/statutes/epa.cfm> (last visited June 9, 2016).

143. *Stanley v. Univ. of So. Cal.*, 13 F.3d 1313 (9th Cir. 1994). Marianne Stanley had two AIAW championships when she coached Nancy Lieberman and the Old Dominion University teams in 1979 and 1980. She secured for Old Dominion a NCAA championship in 1985. In 1993, she was the USC Pac-10 Coach of the Year and was in contract re-negotiation talks when the two sides could not agree. *Id.* at 1316. Stanley called USC’s offers insulting and USC responded by firing her. *See id.* at 1316–18.

144. *Id.* at 1319 (second alteration in original) (quoting Appellant’s Opening Brief at 34, *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313 (9th Cir. 1994) (No. 93-56185)).

145. *Id.* at 1321.

Raveling's qualifications, the majority skips over the many ways in which gender discrimination insidiously affected the University's treatment of the women's basketball program and Stanley as its Head Coach. The University's half-hearted promotion of the women's basketball program, its intensive marketing of the men's basketball program, and the formidable obstacles Stanley faced as a woman athlete in a male-dominated profession contributed to this disparate treatment.<sup>146</sup>

Although Stanley did not succeed in the court system on Equal Pay claims, her suit had a lasting effect by challenging athletic programs to consciously consider how they were spending their time and dollars.

The market value for coaches has skyrocketed on both the men's and women's side since the early 1990's. It was major news in 1994 when women made either the same salary as their male counterparts or broke the \$100,000 mark.<sup>147</sup> Today, the gap is larger between male and female coaches, but the salaries are higher than ever.<sup>148</sup> The average men's salary for all sports was \$267,007 in 2010, while women's sports was \$98,100.<sup>149</sup> For Division I basketball, the coaches of men's teams' median salary in 2010 was \$329,300, and for the coaches of women's teams, the median salary was \$171,600.<sup>150</sup> Salaries are one element, but the biggest differences are seen in third-party resources, benefits, buy-out clauses, and termination clauses.<sup>151</sup>

The Title IX investigator's manual and policy interpretations from OCR recommend evaluating coaching compensation for women's sports versus men's sports by looking at factors like rate of compensation, duration of the contract, conditions relating to contract renewal, experience, nature of coaching

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146. *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1080 (9th Cir. 1999) (Pregerson, J., dissenting).

147. Scott M. Reid, *Coaches' Gender Equity: Equal Pay - Matching Salaries for Men, Women a College Fad*, ATLANTA J.-CONST., Mar. 13, 1994, at E6. In 1992-93, Debbie Ryan at the University of Virginia was awarded the same pay as her male counterpart, \$106,000. *Id.* Pat Summit at Tennessee made \$110,000, where the male counterpart made \$100,000. *Id.* In 2013-14, Holly Warlick made \$485,000 (after winning SEC coach of the year honors her first year succeeding Pat Summit), whereas her male counterpart made \$1.3 million in his second season at Tennessee.

148. James K. Gentry & Raquel Meyer Alexander, *Pay for Women's Basketball Coaches Lags Far Behind Men's Coaches*, N.Y. TIMES (Apr. 2, 2012), <http://www.nytimes.com/2012/04/03/sports/ncaa-basketball/pay-for-womens-basketball-coaches-lags-far-behind-mens-coaches.html>. Pat Summit and Geno Auriemma made around \$2 million, but they are the exceptions. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

duties performed, working conditions, and other terms of employment.<sup>152</sup> The marketplace is currently determining the going rate and terms of hiring the best coaches for a school, whether it is a men's team or a women's team.

Section 106.54(a) of Title IX is tailored after Title VII, and section 106.54(b) is tailored after the Equal Pay Act.<sup>153</sup> The only way that section 106.54 could be used in the coaching realm is if the job is defined in a sex-neutral manner.<sup>154</sup> A disparate impact claim under Title IX could be made as follows: if men's positions are paid more and women are excluded from those jobs (athletic directors are not hiring women to coach men's team sports) without regard for their qualifications, then a Title IX violation may occur.<sup>155</sup> For example, if women are excluded from coaching men's teams, and women can only get the lower paying jobs coaching women, then, Section 106.54(a) may come into play.<sup>156</sup> Because there are currently no female coaches of men's basketball at the Division I level, this may be a valid avenue for female coaches of women's basketball. The power of Title IX to reach this far allows for the possibility that it can also reach the discrimination allegation in the University of Iowa case. If a university responds differently to complaints about female coaches than male coaches and the coaching methods used by female and male coaches, then it may be found that they are being treated differently simply based upon gender.

Under the EPA, men and women must be paid equal wages if they perform substantially the same work—same skill, effort, and responsibility—and performed under similar conditions. In 1963, women were making fifty-nine cents for every dollar a man made; today, they are making eighty-one cents.<sup>157</sup> In a traditional EPA case, if the plaintiff can prove that the job is equal, the burden shifts to the defendant to prove that there is a valid non-discriminatory reason for the difference.<sup>158</sup> As seen in *Stanley*, the court gave two justifications for the salary discrepancy: pressure and different responsibilities for revenue-producing men's sports. Television dollars, the opportunity for NCAA tournament shares, and alumni support seem to be the primary reasons for the differential today. Pressure is self-imposed. All coaches coach to win. Second, revenue generation can only hold true for the small share of NCAA Division I

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152. BONNETTE & DANIEL, *supra* note 80.

153. *Id.* at 177.

154. *Id.*

155. *Id.*; see also Cathryn L. Claussen, *Title IX and Employment Discrimination in Coaching Intercollegiate Athletics*, 12 U. MIAMI ENT. & SPORTS L. REV. 149, 164–65 (1994).

156. See ACOSTA & CARPENTER, *supra* note 5, at 18–28; see also Claussen, *supra* note 155, at 165.

157. *Equal Pay*, U.S. DEP'T LAB., <http://www.dol.gov/equalpay/> (last visited June 9, 2016).

158. Equal Pay Act, 29 U.S.C. § 206(d)(1)(iv) (2016).

schools that make money.<sup>159</sup> It may be better phrased as trying to decrease the amount that a program is operating in the red.

## VII. TITLE VII AND DISPARATE IMPACT

Title VII is potentially broader than the EPA because Title VII does not have an equal work standard. Title VII, the major federal employment discrimination law, states:

It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to . . . sex . . . ; or (2) to limit . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of . . . sex . . . .<sup>160</sup>

An exception carved out in Title VII is a “bona fide occupational qualification.”<sup>161</sup> In the sports world, there is no bona fide occupational qualification for women coaching women or men coaching men. Is there a bona fide occupational qualification for men coaching women? If not, why is it that women hold only 2.5% of coaching positions in men’s sports across all three NCAA divisions, and none of these are in revenue generating sports in Division I? No satisfactory answer is offered. Rather, it only emphasizes the problem facing female coaches.<sup>162</sup>

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159. Gary Brown, *Financial Gap Widening in Division I*, NCAA.COM, <http://www.ncaa.com/news/ncaa/2011-06-15/financial-gap-widening-division-i> (last updated June 15, 2011) (showing a widening financial gap in Division I). For a look at the full NCAA report, see DANIEL L. FULKS, NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT: REVENUES & EXPENSES 2004–2010, (2011), <http://www.ncaapublications.com/productdownloads/2010RevExp.pdf>. In Division I, 58% of the football programs, 56% of men’s basketball programs, and only one women’s basketball program are self-sufficient. However, due to the fact that the entire athletic department relies on these funds, only twenty-two schools were in the black during 2010–2011.

160. 42 U.S.C. § 2000e-2(a) (2016).

161. §2000e-2(e).

162. The addition of Becky Hammon as an assistant coach for the San Antonio Spurs in 2014–2015 is a positive. There was a unique set of circumstances that made it a reality. The question remains: will it be enough to break the barrier for women coaching men in college athletics? Bernadette Maddox at Kentucky (filling the unique role of a “mother figure” for Coach Pitino) was a one-hit wonder. The recent hire of Nancy Lieberman by her longtime friend George Karl will be watched closely to see if the trend can continue.

## VIII. STATE LAW

In addition to the major federal laws that address discrimination on the basis of sex, state law also plays a major role. States are giving more attention to the athletic departments at public universities, as seen with the Minnesota legislature above. In addition, they are concerned about sexual harassment on campuses and what universities are doing to be in compliance with Title IX. The more state legislatures discuss these issues, the better. For example, the Palmer Township Athletic Association instituted a policy of hiring female coaches to coach girls' teams. A Pennsylvania state court held the policy was in violation of the Pennsylvania Equal Rights Amendment because it was not gender blind.<sup>163</sup>

Based on the active cases discussed *supra*, each state has its own version of a human rights or civil rights code. For example, the Iowa Civil Rights Commission, Iowa Code section 219.9(4), prohibits discrimination on the basis of sex in education.<sup>164</sup> Although it is not separate from other discrimination codes like Title IX, the Iowa Code mimics the language of Title IX. Similarly, the Minnesota Human Rights Act mirrors Title VII.<sup>165</sup> The only difference is that under Title VII, the employer must have at least fifteen employees, where the Minnesota law applies to employers regardless of the number of employees. Tennessee is a referral jurisdiction state: the Tennessee Human Rights Commission can cover a claim, refer it to Equal Employment Opportunity

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163. *Bilotta v. Palmer Twp. Athletic Ass'n*, 33 Pa. D. & C.3d 402, 408–09 (Ct. Com. Pl. 1984).

164. IOWA CODE § 216.9(4) (2016).

It is an unfair or discriminatory practice for any educational institution to discriminate on the basis of race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability in any program or activity. Such discriminatory practices shall include but not be limited to the following practices: 1. Exclusion of a person or persons from participating in, denial of the benefits of, or subjection to discrimination in any academic, extracurricular, research, occupational training, or other program or activity except athletic programs; 2. Denial of comparable opportunity in intramural and interscholastic athletic programs; 3. Discrimination among persons in employment and the condition of employment; 4. On the basis of sex, the application of any rule concerning the actual or potential parental, family or marital status of a person, or the exclusion of any person from any program or activity or employment because of pregnancy or related conditions dependent upon the physician's diagnosis and certification. Iowa Code § 216.9. “\*Educational Institution” includes any preschool, elementary, secondary, or community college, area education agency, or postsecondary college or university and their governing boards.

*Id.*

165. MINN. STAT. § 363A.02 (2016).

Commission (EEOC), or receive a claim from EEOC.<sup>166</sup> A strong suit will allege both federal and state claims, but state law does not preempt federal law.<sup>167</sup> Most importantly, the remedies are similar including, injunctive relief, compensatory damages, punitive damages, attorney fees, front pay, and back pay. Under Title IX, the institution receiving federal funds can lose those funds. Although the reach of Title IX can progress more with federal court decisions and guidance to institutions, settlements have been very productive because they offer more flexibility.

#### IX. FEMALE COACHES—LEARNING FROM OTHER FIELDS

Disparate impact occurs in policies, rules, or systems that appear to be neutral, but result in disproportionate impact on a protected group, while disparate treatment is intentional discrimination toward a protected group. In college athletics, the issue is more disparate treatment.

##### A. *The Glass Ceiling*

The “glass ceiling” is a term used to capture the visible, but unbreakable, barrier that keeps women from reaching the highest leadership positions. Val Ackerman, former commissioner of the WNBA and current commissioner of the Big East Conference, blames the “extraordinary demands” of collegiate coaching for the decrease of women: “Coaching is 24/7,” she says. “You’re never off. If you’re out of practice or traveling, you’re on the phone with recruits. If you’re a parent and have family obligations, men and women—though women tend to get harder hit—that’s, as a result, created a fallout.”<sup>168</sup>

A comparison with the law profession shows an interesting phenomenon that supports the decline of female coaches, but it does not deal with the gender of the athletes. The American Bar Foundation analyzed a cohort of lawyers over the course of their careers. They found that the number of female lawyers who make partner decreases at a larger rate than their male counterparts. The most common reason for the decline was childrearing and family obligations.<sup>169</sup>

##### B. *The Glass Cliff*

Another phenomenon found in the business world has been labeled the

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166. TENN. CODE ANN. § 4-21-101 (2016).

167. *Wrobbel v. Asplundh Constr. Corp.*, 549 F. Supp. 2d 868, 872 (E.D. Mich. 2008).

168. Auerbach, *supra* note 66.

169. Bryant G. Garth et al., *After the JD*, AM. B. FOUND., <http://www.americanbarfoundation.org/research/project/44> (last visited June 9, 2016).

“glass cliff.” The glass cliff refers to women being recruited disproportionately into tougher jobs, where the title may be big, but the odds of success are quite small.<sup>170</sup> When a company is doing well, stereotypical male characteristics are encouraged (competitiveness and decisiveness). However, when a company is in crisis, stereotypical female characteristics are encouraged (communication skills and the ability to encourage others). Women who fail at turning around companies in crisis fall off the cliff. Female CEOs are more likely to be fired or forced out than men, and when female CEOs do leave, they are more likely to be replaced by a male.<sup>171</sup> The female CEO, unlike her male counterpart, struggles to get another CEO or comparable position.<sup>172</sup>

The glass cliff relates to intercollegiate coaching and could have a bigger impact if the NCAA makes significant changes in its amateurism model. For example, the Big Five conferences, or major football conferences, will be more likely to hire male coaches to coach their women’s teams. The lower to mid-Division I programs will be less attractive to male coaches. Similarly, the programs in Division I that do not support their women’s teams (traditional bottom of conference teams) are harder jobs and will be more likely to be open to female candidates. These programs often are supported less than other programs in their comparison group.

### C. First Generation v. Second Generation Gender Bias

Harvard Business School has a similar ratio of female to male faculty as Division I athletic departments. Only 53 of the 245 faculty members are women (similar to the one in five head coaching ratio). In addition, only nineteen of the ninety-five tenured faculty are female.<sup>173</sup> Although Harvard Business School students are not separated by gender (like female or male athletic teams), the similarity between faculty and coaching gives a solid comparison. When women’s athletics moved to the intercollegiate-based model from the physical education model, the coaches for women’s teams resembled faculty in general—they were trying to gain a presence in a joint department. Harvard is

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170. Susanne Bruckmüller & Nyla R. Branscombe, *How Women End Up on the “Glass Cliff,”* HARV. BUS. REV. (Jan. 2011), <https://hbr.org/2011/01/how-women-end-up-on-the-glass-cliff/ar/1>; see also Bryce Covert, *Julia Pierson, Women Leaders, and the Perils of the Glass Cliff*, NEW REPUBLIC (Oct. 1, 2014), <http://www.newrepublic.com/article/119675/julia-pierson-women-leaders-and-perils-glass-cliff>. Julia Pierson, the first woman to lead the Secret Service, was replaced by the individual who was in charge of the Presidential detail the night the Salahiis slipped past checkpoints. *Id.*

171. *Id.*

172. *Id.*

173. Jodi Kantor, *Harvard Business School Case Study: Gender Equity*, N.Y. TIMES (Sept. 7, 2013), [http://www.nytimes.com/2013/09/08/education/harvard-case-study-gender-equity.html?nl=to-daysheadlines&emc=edit\\_th\\_20130908&\\_r=0](http://www.nytimes.com/2013/09/08/education/harvard-case-study-gender-equity.html?nl=to-daysheadlines&emc=edit_th_20130908&_r=0).

working on the culture of the school. It has found that students who enter with similar backgrounds, undergraduate grades, and standardized test scores are being separated by a gender grade gap. Harvard describes the grade gap as second-generation bias, subtle (and at times invisible) barriers to the progress of women in companies, organizations, or classes. Robin Ely, Senior Associate Dean for Culture and Community at Harvard Business School, describes second generation bias as “a million micro interactions, cultural assumptions, and historic ways of doing business that still carry the imprint of our history of gender hierarchy.”<sup>174</sup> First generation bias is characterized by intentional acts of bias that rarely occur and are prohibited by law. Second generation bias is subtle and can persist in the DNA of an organization or field and puts women at a severe disadvantage.

Only 4.2% of Fortune 500 companies have female CEOs.<sup>175</sup> The number of female leaders in the business world, legal profession, higher education, and medicine has increased since the passage of Title IX.<sup>176</sup>

Still, there is a deep-rooted gender bias in society. Soraya Chemaly describes a “credibility gap” in which sexism shapes human knowledge.<sup>177</sup> The credibility gap is based on a testimonial injustice. In other words, when someone hears a woman, there is a prejudice that does not allow them to think she is credible. This affects how society evaluates knowledge. Research has shown that men get higher jobs, better reviews, and are seen as more competent,

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174. Nanette Fondas, *First Step to Fixing Gender Bias in Business School: Admit the Problem*, ATLANTIC (Sept. 17, 2013), <http://www.theatlantic.com/education/archive/2013/09/first-step-to-fixing-gender-bias-in-business-school-admit-the-problem/279740/>.

175. Tom Ashbrook, *Women, the Workplace, and ‘Second Generation’ Gender Bias*, WBUR: ON POINT (Sept. 3, 2013, 11:00 AM), <http://onpoint.wbur.org/2013/09/03/women-workplace>; see also Catherine Tinsley, *Female Leaders, 3 Strategies for Success in the Workplace*, FORBES (Aug. 8, 2013), <http://www.forbes.com/sites/forbeswomanfiles/2013/08/08/female-leaders-3-strategies-for-success-in-the-workplace/>.

Women who wield power and act assertively often experience backlash that can hurt their rise to the top. When working to incorporate the necessary masculine behaviors, such as being assertive, into their leadership styles to achieve their career goals, female leaders often encounter two distinct prejudices: (1) women are perceived as poorer leaders relative to men and (2) women who overtly demonstrate their competence in this masculine domain incur social punishment.

*Id.* The recommendation: advocate on behalf of others, share your accomplishments, and strike when resources are plentiful.

176. THE UNIV. OF MINN., *THE STATUS OF WOMEN IN COLLEGIATE COACHING: A REPORT CARD*, 2013–14, 1 (2014), [http://www.cehd.umn.edu/tuckercenter/library/docs/research/2013-14\\_INFOGRAPHIC\\_Report-Card\\_Status-of-Women-College-Coaches\\_Dec-18.pdf](http://www.cehd.umn.edu/tuckercenter/library/docs/research/2013-14_INFOGRAPHIC_Report-Card_Status-of-Women-College-Coaches_Dec-18.pdf).

177. Soraya Chemaly, *The Credibility Gap: How Sexism Shapes Human Knowledge*, TED (July 28, 2015), <https://www.youtube.com/watch?v=HJqtUUDhaxA>.



knowledgeable, reliable, and trustworthy. Thus, there exists a credibility gap between the sexes.<sup>178</sup> This is an epistemological flaw in the culture that is preventing women from capturing more diversity in traditionally male fields.<sup>179</sup> Chemaly concludes,

As adults, women's speech is granted less authority and credibility. We aren't thought of as able critics or as funny. Men speak more, more often, and longer than women in mixed groups (classrooms, boardrooms, legislative bodies, expert media commentary and religious institutions.) Indeed, in male-dominated problem solving groups including boards, committees and legislatures, men speak 75% more than women, with negative effects on decisions reached. That's why, as researchers summed up, "Having a seat at the table is not the same as having a voice."<sup>180</sup>

The credibility gap fits with the "think coach, think male" study that stated that student-athletes at the Division I level prefer a male coach.<sup>181</sup> The same economic and social issues may be hindering the progress of female coaches and women in other fields.

#### X. CONCLUSION

The shortage of women coaching women's athletic teams, while the participation of female athletes is at its highest, is based in both economic and social issues surrounding gender and in the legal remedies available to reduce discrimination. Second generation bias exists for women in coaching and for women in comparable fields. The challenge is whether the legal system can reach far enough into the social and economic realities to establish a cure for second-generation bias. Tracey Griesbaum and Shannon Miller will play a key role in the future of intercollegiate athletics for women. As described, the law has helped women excel farther than they had been able to prior to the women's movement of the '60s and '70s. At the same time, there is still further to go. The DNA of the NCAA is weighed down by its male history, "think coaching, think male." With the inevitable changes coming to intercollegiate athletics, the

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178. *Id.*

179. *Id.*

180. Jessica Kirkpatrick, *Stop Interrupting Me: Gender, Conversation Dominance, and Listener Bias*, WOMEN ASTRONOMY (July 2, 2014, 1:00 PM), <http://womeninastronomy.blogspot.com/2014/07/stop-interrupting-me-gender.html>.

181. See GREENAWALT, FLEISCHMAN & SMEATON, *supra* note 67.

opportunity exists to address the number of females coaching both women's and men's athletic teams.

Intercollegiate athletics is going through revolutionary change. Both legal and non-legal means should be utilized to address the issues facing female coaches and the shortage of females coaching women (and men) at the intercollegiate level. In 2015–2016, student-athlete athletic scholarships at the Division I level include the cost of attendance.<sup>182</sup> The National Labor Relations Board has sidestepped making a decision on whether student-athletes are employees under the National Labor Relations Act.<sup>183</sup> In addition, the *Jenkins* antitrust case filed against the NCAA is maturing and appears to be headed to litigation rather than settlement.<sup>184</sup> As the amateur model changes, if the gender pattern in college athletics continues, the gap between men's and women's teams will grow even wider. In addition, as the television packaging of men's football and men's basketball changes, the gap between those sports and all men's Olympic and women's sports will grow even wider.

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182. Steve Berkowitz, *How Cost of Attendance May Become a Recruiting Tool*, USA TODAY (Jan. 14, 2015), <http://www.usatoday.com/story/sports/college/2015/01/14/ncaa-convention-recruiting-cost-of-attendance/21766761/>.

183. Daniel Uthman, *NLRB Will Hear Northwestern Appeal of Employee Decision*, USA TODAY (Apr. 24, 2014), <http://www.usatoday.com/story/sports/ncaaf/2014/04/24/nlr-b-northwestern-football-union-labor-decision-appeal/8113143/>; see Mason Levinson, *Northwestern Football Players Cannot Form Union, NLRB Rules*, BLOOMBERG (Aug. 17, 2015), <http://www.bloomberg.com/news/articles/2015-08-17/northwestern-football-players-cannot-form-a-union-nlr-b-rules>; see also Nw. Univ., 362 N.L.R.B. No. 167, 204 L.R.R.M. (BNA) 1001, 2015 WL 4882656 (Aug. 17, 2015).

184. Tom Farrey, *Jeffrey Kessler Files Against NCAA*, ESPN (Mar. 18, 2014), [http://espn.go.com/college-sports/story/\\_/id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model](http://espn.go.com/college-sports/story/_/id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model).